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Emotional Paternalism

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EMOTIONAL PATERNALISM

Jeremy A. Blumenthal

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EMOTIONAL PATERNALISM

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[I]t is the reason, alone, of the public, that ought to control and regulate the government. *The passions [of the public] ought to be controlled and regulated by the government.*¹

I. INTRODUCTION

At least two bodies of legal scholarship have recently challenged the primacy of the traditional rational-actor, law and economics approach to law and policy.² The first, taking a cognitive-psychological or behavioral economics approach, focuses on mental heuristics and biases that lead to departures from optimal or rational decisionmaking. This literature is voluminous and increasing.³ A second line of legal scholarship focuses on the role of emotion in legal judgment and decisionmaking, whether by judges, juries, bureaucrats, legislators, or citizens. Although somewhat less developed than the first,⁴ this

1. THE FEDERALIST NO. 49 (James Madison) (emphasis added).

2. I use the term “recently” advisedly. Certainly, as discussed below, the second line of research—incorporating empirical research on the emotions—has only begun to be fully recognized. See Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006). But scholars have noted the flawed axioms of law and economics and pure rational choice models, albeit sporadically, over at least the last five decades. See, e.g., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL (1957); Ward Edwards, *Behavioral Decision Theory*, 12 ANN. REV. PSYCHOL. 473 (1961); Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and their Implications for the Law*, 59 S. CAL. L. REV. 225 (1986). More generally, psychologists and other social scientists have suggested that their research has useful application to the law since at least the early 20th century. See Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 7-13 (2002) (reviewing the early conversation between the disciplines of psychology and law). And perhaps “challenged” is too weak a word. Both theoretical and empirical research in psychology and economics have demonstrated the unrealistic premises of the traditional law and economics approach, which assumes essentially rational, ideally unemotional actors who seek to maximize utility and welfare. Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1774 (2003) (“[T]he debate over whether the economists’ Chicago Man or the psychologists’ K-T Man better describes reality is over; the psychologists won.”).

3. For general overviews documenting the departures, see JUDGMENT UNDER UNCERTAINTY, *supra* note 2; HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991). For general discussions of the application of this literature to the law see, for example, BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000); Symposium, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 NW. U. L. REV. 1075 (2003).

4. This is so for a number of reasons. First, as a general matter, emotions have long been neglected in legal and economic discussions. Yuval Rottenstreich & Suzanne Shu, *The*

line of writing, and the empirical social science research it often seeks to incorporate, has likewise demonstrated departures from the traditional conception of a rational decisionmaker. Substantial empirical evidence shows, for instance, that people make different judgments and choices when in a good mood than when in a bad mood.⁵ Emotion biases an individual's perceptions of probability and

Connections Between Affect and Decision Making: Nine Resulting Phenomena, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 444, 459 (Derek J. Koehler & Nigel Harvey eds. 2004) ("One unfortunate consequence of the historical conservative bias in decision-making research was neglect of affective phenomena."); Jon Elster, *Rationality and the Emotions*, 106 ECON. J. 1386, 1386 (1996) ("Emotions are a neglected topic, and the neglect of economists is second to none."). Recently, this "neglect" has been changing, with increasing discussion in the legal literature of issues relating to emotion. See, e.g., THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 366-82 (1996); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005) [hereinafter Blumenthal, *Affective Forecasting*]; Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001); *Emotion in Legal Judgment and Decision Making*, 30 LAW & HUM. BEHAV. (SPECIAL ISSUE) 115-248 (2006). See generally Blumenthal, *supra* note 2, at 24-25 (noting the recent increase in legal attention to the emotions); Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974 (2001) (discussing the same); Maroney, *supra* note 2 (reviewing the increase in scholarship). Second, there has been a tendency for legal discussion of emotions to focus on philosophical approaches; indeed, the best-known works on emotion in the law are those of philosophers. See, e.g., JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* (1999); MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001) [hereinafter NUSSBAUM, *UPHEAVALS OF THOUGHT*]; Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW, *supra*, at 19. To an extent, this has led to fewer efforts to incorporate empirical work into legal discussions than might be expected. Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 4 (2005) [hereinafter Blumenthal, *Mood and Moral Judgment*] (noting that despite "interest in the potential for affect to influence 'rational' reasoning, legal scholars and social scientists have conducted far less empirical research directly testing such questions than might be expected"). Third, there is debate even among empirical social scientists about the nature and phenomenology of emotions, as well as about the processes by which emotion affects, influences, interacts with, controls, or is subject to, more "rational" cognitive processes. See generally HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS (Paul Ekman & Richard J. Davidson eds., 1994). Although the disagreement this debate has led to can be overstated, it can nevertheless yield a misleading picture of the field as somewhat incoherent.

5. For reviews of the extensive empirical data on the influence of mood on social and interpersonal judgments, see Gordon H. Bower, *Mood Congruity of Social Judgments*, in EMOTION AND SOCIAL JUDGMENTS 31 (Joseph P. Forgas ed., 1991); Joseph P. Forgas, *Mood and Judgment: The Affect Infusion Model (AIM)*, 117 PSYCHOL. BULL. 39 (1995); Norbert Schwarz, *Feelings as Information: Informational and Motivational Functions of Affective States*, in 2 HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 527 (E. Tory Higgins & Richard M. Sorrentino eds., 1990); and see generally FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION (Joseph P. Forgas ed., 2000).

risk.⁶ Similarly, contrary to the predictions of rational decisionmaking, when a judgment about the outcome of a particular action is accompanied by strong emotion, people's decisions about those outcomes are relatively impervious to changes in their probability.⁷ And people tend to inaccurately predict their own future emotional states—as well as those of others—even when the predictions concern important self-relevant events or, in some cases, are even minutes in the future.⁸

Commentators reviewing the burgeoning literature in these two lines of scholarship have begun to discuss its practical implications for the law. Most recently, they have focused on what the research might suggest for an increased third-party role to help protect individuals from their own biases.⁹ That is, the most recent discussion has focused on the findings' implications for the appropriateness and scope of paternalistic policies.¹⁰

This paternalism discussion, however, has been incomplete in a number of contexts. First, despite a substantial focus on the implications of the first line of scholarship (documenting cognitive biases), commentators have addressed the implications of emotional biases far less.¹¹ Second, much (but by no means all) of the most recent discussion has been in the context of intervention by private parties,

6. See *infra* Part III.C.2.b.ii.

7. See, e.g., Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61 (2002).

8. Blumenthal, *Affective Forecasting*, *supra* note 4, at 166-73.

9. See, e.g., *id.* at 234-37; Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003); Jolls et al., *supra* note 3; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003); Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006) [hereinafter Rachlinski, *Cognitive Errors*]; Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003) [hereinafter Rachlinski, *Uncertain Psychological Case*]; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). Responses to these proposals are percolating. See, e.g., Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133 (2006) (responding in part to Sunstein and Thaler's proposals); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620 (2006) (criticizing Sunstein and Thaler's proposals); Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005) (criticizing Sunstein and Thaler's proposals); Douglas Glen Whitman & Mario J. Rizzo, *Paternalist Slopes*, 2 N.Y.U. J. L. & LIBERTY 411 (2007).

10. J.D. Trout, *Paternalism and Cognitive Bias*, 24 LAW & PHIL. 393, 416 (2005) ("If individuals routinely make crucial and predictable errors in judgments about their own welfare, and are unable to control doing so without turning life into an existence of contemplative paralysis or one of distorted value otherwise disavowed, then we should ask for an argument *against* introducing institutional prosthetics.").

11. At times this is an explicit choice. E.g., Glaeser, *supra* note 9, at 136 (choosing to discuss paternalism in the context of bounded rationality rather than potentially emotional "self-control problems"). But see Blumenthal, *Affective Forecasting*, *supra* note 4, at 234-37; Camerer et al., *supra* note 9, at 1238-47; Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

rather than addressing potential governmental steps—legislative or judicial—to protect individuals from their errors. Third, although commentators have recently noted the importance of comparing the costs and benefits of paternalistic interventions, there has been little specification of those costs and benefits. In particular, commentators in this area have largely avoided the question of how difficult it might be to correct such biases, and thus how effective any such interventions might in fact be.

In this Article, I evaluate and extend this developing discussion of using social science data to justify paternalism and address these three gaps in the literature. After Part II's critical review of the existing literature, including discussion of whether paternalistic intervention is justified in the first place,¹² I move in Part III to remedy some of these gaps. I document not only cognitive but emotional biases that people are subject to, including a number that have been little discussed in legal academia. I note the importance of such emotional biases to legal decisionmaking and illustrate potential legal errors to which they may lead.¹³ I also mention implications of such errors for paternalistic intervention by government, both by legislatures and by courts. In the distinct contexts of cognitive and emotional biases, one sort of government intervention may be appropriate where another is not. Finally, in Part IV, I take steps toward evaluating the effectiveness of measures to correct cognitive and emotional biases, a step mentioned but not pursued in discussions of social science and paternalism.¹⁴ Specifically, I draw on empirical social science literature to examine whether effective mechanisms exist to correct various cognitive and emotional biases at the individual level, with implications for policy at the larger interpersonal and societal level.¹⁵ Throughout, I identify potential objections to some of the points I raise, summarizing and concluding with further speculation about the appropriateness of paternalistic intervention by the State.

To preview, my points might be made as follows: as scholars are currently suggesting, based on people's susceptibility to biased decisionmaking, third-party intervention may at times be warranted. Most academic discussion of this point has focused on cognitive biases, but people are also—perhaps even more—susceptible to *emotional* biases, many of which I review, along with the potential interventions they imply. As difficult as cognitive biases are to correct,

12. See *infra* Part II.

13. See *infra* Part III.

14. Camerer et al., *supra* note 9, at 1214-18; Mitchell, *supra* note 9; Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1219; See Trout, *supra* note 10, at 417 ("[T]here has been far less research on correcting biases than [on] establishing their existence.").

15. See *infra* Part IV.

however, emotional biases may be even more difficult. That distinction has important consequences for the cost-benefit analysis that should evaluate the propriety of a paternalistic intervention, and I close the Article with a discussion of weighing such costs and benefits.

II. WHY PATERNALISM?

A. *Defining Paternalism*

As an initial matter, of course, what do we mean by “paternalism”? More broadly, why should any sort of intervention into an individual’s behavior, preferences, attitudes, or autonomy be warranted?

Unsurprisingly, there is no unequivocal definition of “paternalism” or of what constitutes a “paternalistic act.” Some definitions suggest simply that it is an action taken in order to benefit the action’s target.¹⁶ Some focus as well on the degree of consent expressed by the target, emphasizing that a paternalistic act toward B is one that would be pursued by A if A acted for B’s benefit and would do so even knowing that B did not consent.¹⁷ Most commonly, a paternalistic act is seen as some action by one party that interferes with another person’s freedom, with the goal of furthering the latter’s own good.¹⁸

This conventional definition may be incomplete, however. Donald VanDeVeer has pointed out an additional factor that will become relevant in the present discussion, and that ties in to Shapiro and

16. See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 522 (1988) (“At the core of every definition . . . is the notion that [a paternalistic action] must be taken in order to benefit [the target].”). As Professor Shapiro and others recognize, this is almost certainly too broad a definition. *Id.* at 523; see also DONALD VANDEVÉER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE 17-18 (1986) (suggesting that simply benevolent or altruistic actions need not be considered “paternalistic”).

17. See Shapiro, *supra* note 16, at 523; cf. Paul Burrows, *Analyzing Legal Paternalism*, 15 INT’L REV. L. & ECON. 489, 495 (1995) (arguing that an action is paternalistic “if its intention . . . is to persuade, induce, or compel any individual to do something that he would not otherwise have chosen to do, in order to bring benefits to that individual”).

18. See, e.g., Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763 (1983) (“[A]ny legal rule that prohibits an action on the ground that it would be contrary to the actor’s own welfare is paternalistic.”); Trout, *supra* note 10, at 408 (defining paternalism as “the interference with a person’s actions or knowledge, against that person’s will, for the purpose of promoting that person’s good”); VANDEVÉER, *supra* note 16, at 18 (arguing that a paternalistic act is one that “interferes with another with the aim of promoting his/her own good (or preventing harm from accruing to that other)”; Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998) (“Paternalism is intervention in a person’s freedom aimed at furthering her own good.”); cf. Andrew Caplin, *Fear as a Policy Instrument*, in TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE 441, 454 (George Loewenstein et al. eds., 2003) (“Even if head-in-the-sand behavior is currently attractive, the social planner may have reason to intervene if he or she believes that the subject will later be grateful for intervention.”).

others' connection of paternalism with *consent*. That is, conduct may in fact be paternalistic even when it apparently is done with the target's consent. In VanDeVeer's example, an individual who believes he will drink too much at a party gives his car keys to a friend, asking the friend to hide the keys or in some other way prevent him from driving home.¹⁹ When the friend does in fact refuse to return the keys upon the drinker's post-debauch request, he may be seen to be acting paternalistically—acting against the drinker's wishes for the drinker's own good—despite the drinker's (initial) consent. Thus, under VanDeVeer's approach, "an action is paternalist if it is at odds with the subject's preferences at the time of the action; paternalist action may be justified, however, by prior consent."²⁰

Thus, paternalistic action need not *only* be action that violates a subject's consent. More important, this example demonstrates the "multiple selves" problem: which preference should be privileged when someone expresses a preference at Time₁ that changes at Time₂?²¹ This tension arises in the opposite direction as well, when courts step in to protect an individual from his own previous decisionmaking biases or errors. In these circumstances, an individual made a decision at Time₁ that he realizes at Time₂ does not reflect his true preferences (this reverses VanDeVeer's example, where the Time₁ choice reflects the individual's true preferences, but the Time₂ choice—made when inebriated—does not). He therefore seeks judicial intervention at Time₂ to release him from the consequences of that decision.²² In both sets of circumstances, there is a tension be-

19. VANDEVEER, *supra* note 16, at 23-24.

20. Shapiro, *supra* note 16, at 524 n.17.

21. Blumenthal, *Affective Forecasting*, *supra* note 4, at 179 n.156 (noting multiple selves problem); Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 92 (1999) (raising issue of "which phase of an individual's evolving personality has priority when her wishes [at Time₁] differ from those [at Time₂]"); Daniel Kahneman, *New Challenges to the Rationality Assumption*, 3 LEGAL THEORY 105, 120 (1997) (noting the likely "incompatible" preferences of a person's "separate selves" and asking which should be privileged). For empirical evidence that this problem occurs, see Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self is Seen as an Other*, 90 J. PERSONALITY & SOC. PSYCHOL. (2006) (demonstrating that individuals see their past and future selves as a different person from their present self).

22. Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. (forthcoming 2008) [hereinafter Blumenthal, *Abortion, Persuasion, and Emotion*]; see also Blumenthal, *Affective Forecasting*, *supra* note 4, at 235-37; *infra* Part III.C.2.c.i (discussing, in the context of paternalism, one commentator's suggestion that courts broaden securities law doctrine to include consideration of potential emotional biases in order to protect investors against emotional, as well as cognitive, errors). This is an example of what Klick and Mitchell refer to more broadly as "ex post paternalism." Klick & Mitchell, *supra* note 9, at 1636. With Klick and Mitchell, then, I consider such judicial paternalism "simply shorthand for government assistance available to protect a party from an earlier, supposedly irrational act." *Id.* at 1636 n.48.

tween an expressed preference at one time that (a) is different from that expressed at another time and, more important, (b) does not reflect what the decisionmaker's true preferences would be at the time of the expressed preference. Either example, therefore, *may* warrant intervention to privilege the true preference, whether expressed at Time₁ or Time₂.²³ The question thus becomes, what sort of intervention might be allowed to privilege one preference set over a conflicting set?²⁴

Other definitions of paternalism seem overbroad. In a recent article on paternalism, Cass Sunstein and Richard Thaler allude to government rules about who should bear the loss in an accident as an example of "[d]efault rules" that "much of the time" influence preferences and choices, and that thus constitute paternalism.²⁵ They also suggest that paternalistic intervention may be "inevitable," in the sense that default rules always have *some* effect on decisionmaking.²⁶ Thus, any time a central planner establishes *some* such rule, that planner has acted paternalistically to an extent, influencing the individual's choice.²⁷ Implicit in their discussion of default rules is that any government action—even a "minimum of state intervention"²⁸—can qualify as paternalistic.

But all state action, even that which "affect[s] preferences and choices," need not be considered paternalistic in the conventional sense.²⁹ Their example—deciding which party should bear a loss—

23. See Blumenthal, *Affective Forecasting*, *supra* note 4, at 216 n.400 and following text (suggesting some circumstances in which such intervention can be appropriate). This approach, of course, is not just a means for an individual to simply change his mind from Time₁ to Time₂—an "escape hatch"—and thereby obtain judicial intervention. See *id.* at 213 nn.386-87 and accompanying text; Coleman, *supra* note 21, at 98-99 n.209. The distinction is related to Professor Shapiro's framing of "'regret theory' [which] distinguish[es] between disappointment, which we need not worry about . . . and regret, which is cause for concern. . . . A person suffers regret if he commits himself to a course of action that he later wishes to abandon because of a change of goals." Shapiro, *supra* note 16, at 549.

24. See Korobkin & Ulen, *supra* note 3, at 1124 ("The proper answer to [such] questions might rest, at least in part, on whether we believe that the present self or the future self best represents the preferences of the single individual. In all likelihood, this will have to be a situation-specific judgment.").

25. Sunstein & Thaler, *supra* note 9, at 1174-75 ("[A] minimum of state intervention is always necessary. . . . When a loss is left where it falls in an auto accident, it is not because G[-]d so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim's friends, if they are stronger, from taking compensation from the injurer." (quoting Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-91 (1972))).

26. *Id.* at 1174.

27. Specifically, Sunstein and Thaler argue that often, "some organization or agent *must* make a choice that will affect the behavior of some other people. There is, in those situations, no alternative to a kind of paternalism—at least in the form of an intervention that affects what people choose." Sunstein & Thaler, *supra* note 9, at 1164.

28. *Id.* at 1174.

29. *Id.*

may affect behavior, but is not designed to protect a decisionmaker from her own expressed (and perhaps biased) preferences; indeed, in their own terms, the rule protects the injurer from the behavior of others and, perhaps, protects society against individual inefficiencies and biases.

To the extent that this argument is not tautological, then it is somewhat overbroad. Certainly, not every choice or rule by an agent that simply affects the decisions or behavior of a target need be considered paternalistic. Affecting someone's behavior or choices is almost certainly a *necessary* condition for conduct to be paternalistic, but for it to be a *sufficient* condition suggests that *any* governmental action should be so considered, which is too broad a claim.³⁰ That said, default rules are especially influential given individuals' preference for the status quo. These authors' emphasis on both the power of default rules to affect behavior and the frequency with which such rules must be chosen is important and describes one of the more effective potential mechanisms for intervention.³¹

Thus, despite recognizing the looseness in the term, I use "paternalism" in a conventional sense, to suggest some sort of third-party intervention into behavior or—in the present context—into individuals' decisionmaking processes, with the goal of protecting individuals against the consequences of actual or potential biases in that process.³² Given the present discussion, I incorporate VanDeVeer's notion

30. See *supra* note 25 and following text; cf. *supra* note 16 and accompanying text. Indeed, elsewhere in their article, Sunstein and Thaler use a different definition of paternalism, closer to the one sketched above. Sunstein & Thaler, *supra* note 9, at 1162 ("[A] policy therefore counts as 'paternalistic' if it attempts to influence the choices of affected parties in a way that will make choosers better off.").

31. Professor Mitchell objects to this inevitability argument on empirical grounds as well, suggesting that the possibility of correcting (or "debiasing") such individuals' biased decisionmaking undercuts Sunstein and Thaler's claim. See Mitchell, *supra* note 9, at 1248-60. Despite my objection to Sunstein and Thaler's suggestion, I am not sure Mitchell's point is wholly persuasive either. As discussed further below, and as Mitchell recognizes, debiasing is in fact just one (albeit weaker) mode of paternalistic intervention. Cf. Jolls et al., *supra* note 3, at 1544 ("[G]overnment intervention need not come in highly coercive forms For instance, in the contexts of risks such as smoking, might debiasing techniques work to link the statistical evidence with the personal reality?"). Consequently, if a goal of intervention is to improve decisionmaking (a goal Mitchell challenges, see Mitchell, *supra* note 9, at 1260-69; but see Klick & Mitchell, *supra* note 9), then biased decisionmaking does plausibly warrant intervention. Moreover, as discussed further in Part IV, debiasing is often unsuccessful and, at times, counterproductive. In any event, Mitchell's challenge to Sunstein and Thaler focuses more on the libertarian part of their approach, not the paternalism part—that is, on their assertion that a committed libertarian would find their model of paternalism appealing. See Mitchell, *supra* note 9, at 1247-48 (suggesting that the focus of his criticisms is the libertarian aspect of Sunstein and Thaler's claims); see also Glaeser, *supra* note 9, at 135 (disagreeing with Sunstein and Thaler's assertion).

32. Elsewhere I note the issue of what role intervention might play, not in the context of avoiding disutility, but of enhancing individuals' welfare from baseline. See generally Peter H. Huang & Jeremy A. Blumenthal, *Positive Law and Policy*, in *ENCYCLOPEDIA OF POSITIVE PSYCHOLOGY* (Shane J. Lopez ed., forthcoming 2008) [hereinafter Huang & Blu-

that such intervention (“interference”) will often at least appear to be against the target’s preferences or *expressed* interests, whether articulated at Time₁ or Time₂. Specifically, what I will call *emotional paternalism* is conduct, typically governmental, that intervenes in an actor’s decision or decisionmaking, at Time₁ or Time₂, either when that decisionmaking involves judgments about emotions or emotionally-laden topics, or when it was or has the potential to be biased by affective factors (that is, emotions evoked by the target of a judgment or incidental, transient moods).

B. Justifying Paternalism

Of more concern, perhaps, given the pejorative connotation traditionally attached to the term,³³ is why commentators are increasingly willing to discuss some sort of paternalism. One answer, useful as a first step—but, I suggest, ultimately unsatisfactory—is Sunstein and Thaler’s argument that even if paternalism per se is a so-called “evil,” it may be a lesser one, one that is necessary, or at least inevitable.³⁴ A stronger answer, to which they also point, is grounded in empirical evidence suggesting that the usual objections to paternalism are weaker than is traditionally assumed.

The first such objection is typically that people know their own preferences and are best at choosing them. Libertarian philosophy,³⁵ welfare economics, and numerous legal doctrines³⁶ rely on this assumption. But substantial empirical evidence shows this is not always the case. At a broad level, it is increasingly apparent that people are unable to accurately predict their emotional reactions to future events and, thus, are unable to accurately predict how happy or unhappy an event—such as the satisfaction of a particular preference—might make them.³⁷ I have suggested elsewhere that “if we do

menthal, *Positive Law and Policy*]; Peter H. Huang & Jeremy A. Blumenthal, *Positive Policy/Positive Institutions*, in HANDBOOK OF POSITIVE PSYCHOLOGY (C.R. Snyder & Shane J. Lopez eds., forthcoming 2008) [hereinafter Huang & Blumenthal, *Positive Policy/Positive Institutions*].

33. See, e.g., Paul Burrows, *Patronising Paternalism*, 45 OXFORD ECON. PAPERS 542, 542 (1993) (“[P]aternalism’ is a term of abuse. Paternalism is seen as illiberal, coercive, arrogant and patronizing”); Glaeser, *supra* note 9, at 133 (noting “economics’ traditional hostility towards paternalism”); Shapiro, *supra* note 16, at 519 (“[P]aternalism has not been held in high regard by democratic theorists and practitioners.”).

34. Sunstein & Thaler, *supra* note 9, at 1164.

35. See, e.g., James W. Child, *Can Libertarianism Sustain a Fraud Standard?*, 104 ETHICS 722, 729-30 (1994) (describing assumption of libertarianism that people have a “stable set of preferences”); Mitchell, *supra* note 9.

36. See Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1178 (“The ability of individuals to make good choices for themselves lies at the heart of an enormous collection of legal rules.”).

37. Blumenthal, *Affective Forecasting*, *supra* note 4, at 166-72; Daniel Kahneman et al., *Back to Bentham? Explorations of Experienced Utility*, 112 Q.J. ECON. 375 (1997);

not know what will make us happy or unhappy—or, more precisely, how much something will make us happy or unhappy and how long it will do so—then we can never be sure how to maximize happiness or minimize unhappiness.”³⁸

More narrowly, people often make a variety of poor decisions; financial ones, for instance, especially prospective decisions such as concerning savings and retirement options.³⁹ Sometimes this is due to active choices that turn out to be nonoptimal; other times it is due to inertia or a disinclination to make decisions (for example, choices that are influenced by the “default rules” Sunstein and Thaler discuss).⁴⁰ Such self-injurious choices occur in health and safety contexts as well.⁴¹ Overoptimism and other self-serving cognitive biases can lead to misperceptions of risks to the self—such as a smoker’s underestimate of his risk of dying from lung cancer, despite an overestimate of the link between smoking and cancer—that lead to nonoptimal, unhealthy behavior.⁴² Similarly, consumers might be willing, because of overoptimism, to waive a right to recover for various sorts of injury.⁴³ And such behavior occurs in that ostensibly most rational of arenas—the marketplace. For instance, as discussed below, Russell Korobkin has argued for an expanded reading of unconscionability doctrine based on the likelihood that cognitive biases will allow sellers to manipulate buyers.⁴⁴ And erroneous estimates of the likelihood of one’s own breach, or that of the other contracting party, can lead parties to bear risks that they did not fully consider, or to fail to consider appropriate remedies for breach.⁴⁵ Of course, such evidence of bounded self-knowledge⁴⁶ need not be read as *mandating* paternalistic intervention, but simply as weakening the traditional consequentialist objection to paternalistic policies.⁴⁷

Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1678-79, 1682 n.58 (2003).

38. Blumenthal, *Affective Forecasting*, *supra* note 4, at 231.

39. *E.g.*, Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275 (1991).

40. Sunstein & Thaler, *supra* note 9, at 1181.

41. *See generally* Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1180-81 (giving examples).

42. *Id.* at 1180 (citing Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE L.J. 1133, 1137 (1998)).

43. *E.g.*, Paul Bennett Marrow, *Crafting a Remedy for the Naughtiness of Procedural Unconscionability*, 34 CUMB. L. REV. 11, 26-34 (2003); Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1910-11 (2000).

44. Korobkin, *supra* note 9, at 1206.

45. *See* Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1178-79 (giving examples).

46. Chris Guthrie suggested this term to me.

47. *Cf. infra* notes 70-72 and accompanying text.

Second, there is the usual argument from autonomy, traditionally relied on by legal theorists⁴⁸ and, more recently, by those empirical researchers apparently uncomfortable with the direction in which their data point:⁴⁹ people's freedom to make choices, even nonoptimal ones, should be valued *per se*.⁵⁰ Alternatively, as a sort of mixed utility and autonomy argument, we should value people's *preferences* for the freedom to make choices. That is, the freedom to choose should also be protected because people value that freedom itself.⁵¹

In his assessments of paternalism, Paul Burrows has identified two general justifications for the presumption that the freedom to choose is valuable *per se* and warrants protection against interference.⁵² First, choosing is a skill that improves with experience;⁵³ moreover, choosing and accepting responsibility for one's choices builds character.⁵⁴ Second, reflecting in part the mixed justification noted above, "choosing is an act which yields utility independently of the nature of the outcome of the choice."⁵⁵ Professor Burrows criticized these claims, pointing out, for instance, that choice between

48. See, e.g., Shapiro, *supra* note 16, at 538 (suggesting that numerous courts' willingness to sustain challenges to various sorts of legislation in fact stems from this anti-paternalist perspective, that is, the importance placed on the right to be "let alone" in making choices for oneself).

49. See Blumenthal, *Affective Forecasting*, *supra* note 4, at 236 (noting this hesitancy in researchers discussing such findings); cf. Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. 87, 93 (2006) ("By the way, note that I am truly not an eager paternalist."); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1171 (1986) (distinguishing between governmental "interference" and "troublesome" paternalism.)

50. See Sunstein & Thaler, *supra* note 9, at 1167 n.22 ("Some of the standard arguments against paternalism rest not on consequences but on autonomy—on a belief that people are entitled to make their own choices even if they err."). But see, e.g., John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1024 (2001) (suggesting that the potential gains from precommitment strategies he argues for "should not be shunted aside with an *ipse dixit* about personal liberty").

51. See Zamir, *supra* note 18, at 240 (suggesting that "[h]aving relatively broad freedom to make one's own decisions, including wrong ones, is probably quite high on most people's list of ideal preferences").

52. Burrows, *supra* note 33, at 556.

53. *Id.* Klick and Mitchell also seem to advance this approach, relying on psychological theory suggesting that the decisionmaking process tends toward a learning process, and thus, people should be allowed to make mistakes and learn from them. See Klick & Mitchell, *supra* note 9; see also Shapiro, *supra* note 16, at 546 ("[T]he very ability to choose—which necessarily implies the ability to make poor choices by some objective standard—is critical to the growth of our diverse intellectual, emotional, and volitional capacities."). That theory, and the findings upon which Klick and Mitchell rely, however, may not be as clear-cut as they suggest. See James P. Byrnes, *The Development of Decision-making*, 31 J. ADOLESCENT HEALTH 208, 214 (2002) (the psychologist on whose work they rely most heavily notes that despite his model and findings, "learning is by no means automatic when people are shown the errors of their ways," outlining circumstances in which such learning may not occur).

54. Burrows, *supra* note 33, at 556.

55. *Id.*

unpleasant options is likely painful and may not build character.⁵⁶ Moreover, he suggested that there is no presumptive reason to assume that skill in making decisions in one context should translate to other contexts.⁵⁷

Over and above these conceptual qualifications, empirical research undercuts the second general justification in at least two ways.⁵⁸ First, it seems that people often prefer *not* to have to make decisions.⁵⁹ During the decisionmaking process, individuals tend to prefer to “keep [] doors open”; that is, to retain the option of changing their minds, even at the expense of decision quality.⁶⁰ Second, when they do make decisions, both the preference for choice⁶¹ and having more options from which to choose can lead to less utility and worse decisions.⁶² Empirical research shows that although people often want a decision to be reversible—that is, they prefer the possibility of changing their mind—they are often less satisfied with their choice when it is reversible relative to when they make a decision and are

56. *Id.* at 556-57.

57. *Id.* at 557. *But see* Klick & Mitchell, *supra* note 9.

58. The research findings thus do address the autonomy rationale “head-on.” Shapiro, *supra* note 16, at 547 (“Some defenses of limited paternalist intervention do not attempt to meet these [autonomy] arguments head-on.”).

59. *See* Jane Beattie et al., *Psychological Determinants of Decision Attitude*, 7 J. BEHAV. DEC. MAKING 129 (1994) (noting situations leading to hesitancy to make decisions); Barry Schwartz et al., *Maximizing Versus Satisficing: Happiness Is a Matter of Choice*, 83 J. PERSONALITY & SOC. PSYCHOL. 1178 (2002) (reporting that increased options often make decisionmakers less happy with outcomes); Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999) (discussing contexts in which people prefer to have others make their decisions); Philip E. Tetlock et al., *The Psychology of the Unthinkable: Taboo Trade-Offs, Forbidden Base Rates, and Heretical Counterfactuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 853 (2000) (noting tendencies to reject or avoid making decisions involving highly morally-charged issues); Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980); *see also* Korobkin, *supra* note 9, at 1223 (noting consumers’ preference for minimizing the effort of a decision); Amy B. Monahan, *Addressing the Problem of Impatients, Impulsives, and Other Imperfect Actors in 401(k) Plans*, 23 VA. TAX. REV. 471, 509-10 & n.157 (2004) (discussing pension plan participants’ tendency to procrastinate in deciding to enroll; noting success of automatic enrollment procedures in avoiding procrastination due to “low transaction costs”).

60. Jiwoong Shin & Dan Ariely, *Keeping Doors Open: The Effect of Unavailability on Incentives to Keep Options Viable*, 50 MGMT. SCI. 575, 575 (2004).

61. *See* Daniel T. Gilbert & Jane E.J. Ebert, *Decisions and Revisions: The Affective Forecasting of Changeable Outcomes*, 82 J. PERSONALITY & SOC. PSYCHOL. 503 (2002).

62. Schwartz et al., *supra* note 59, at 1178-79; *cf.* Ellen Berscheid & Bruce Campbell, *The Changing Longevity of Heterosexual Close Relationships: A Commentary and Forecast*, in *THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE* 209, 223 (Melvin J. Lerner & Sally C. Lerner eds., 1981) (noting, in quite a different context, that “[t]o have a perpetual choice means that one must choose not once, but over and over again. And to do so, one must continually expend time and energy in evaluating and reevaluating the wisdom of the choice.”). In fact, the simple act of considering alternatives and choosing between options can increase the appeal of the foregone option. Ziv Carmon et al., *Option Attachment: When Deliberating Makes Choosing Feel Like Losing*, 30 J. CONSUMER RES. 15 (2003).

committed to it.⁶³ More broadly, recent empirical work calls into question the traditional assumptions that choice—and the perception of control over that choice—generates utility and psychological well-being.⁶⁴ In fact, too much choice can be conflicting, difficult, and may even lead to decreased experienced utility.⁶⁵ Thus, the assumption that people value making decisions is often wrong. Moreover, even when it is correct, the ability to choose can lead to decreased, not increased, utility.⁶⁶ Another aspect of the autonomy argument is thus weakened. Again, this weakening does not mean the argument is invalid or that paternalistic policies necessarily trump any claim to individual autonomy. The data simply suggest that the standard objections must meet higher hurdles than have heretofore been set in order to be fully persuasive.⁶⁷

C. *Literature on Social Science and Paternalism*

Building on these and other data, legal commentators have thus lately moved the long-standing debate over the propriety of paternalistic intervention into the empirical realm. Such analysis proffers social science findings as one response to traditional objections to paternalism. For instance, in a provocative article presenting much of the cognitive heuristics and biases literature in a systematic way,⁶⁸ Christine Jolls, Cass Sunstein, and Richard Thaler identified an “anti-antipaternalism” argument reflecting the discussion above.⁶⁹ In

63. Gilbert & Ebert, *supra* note 61.

64. See, e.g., Ap Dijksterhuis, *Think Different: The Merits of Unconscious Thought in Preference Development and Decision Making*, 87 J. PERSONALITY & SOC. PSYCHOL. 586 (2004) (reporting experiments showing that unconscious decisions can be better than more fully considered decisions).

65. Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995, 1003-04 (2000) [hereinafter Iyengar & Lepper, *When Choice is Demotivating*] (reporting that people are more satisfied when choices are limited); Schwartz et al., *supra* note 59, at 1179 (suggesting that for some people, too much choice can lead to negative psychological well-being); see also Sheena S. Iyengar & Mark R. Lepper, *Choice and Its Consequences: On the Costs and Benefits of Self-Determination*, in SELF AND MOTIVATION: EMERGING PSYCHOLOGICAL PERSPECTIVES 71, 76-83 (Abraham Tesser et al. eds., 2002) (noting cultural influences on the benefits of choice).

66. See Iyengar & Lepper, *When Choice is Demotivating*, *supra* note 65, at 1004 (showing that manufacturers and marketers have identified the problem of “too much choice” and that one company found that reducing the number of products in a product line led to increased sales). One reason the Iyengar and Lepper findings are surprising is an established line of psychological scholarship supporting the intuitive link between choice and utility. See *id.* at 995-96 (describing studies). Taking all these findings together might suggest that for various choices and for some people there may be some optimal number of choices. If so, one question in the paternalism context is whether government can and should intervene to identify and administer that optimal number.

67. Of course, the imposition on autonomy could simply be seen as another cost to be considered in the cost-benefit analysis. See *infra* Part V.

68. Jolls et al., *supra* note 3.

69. *Id.* at 1541-45.

particular, they addressed the standard consequentialist objection to paternalism that people generally know what is good for them. They characterized this objection, reflected in the traditional law and economics approach, as presuming that “citizens, assuming they have reasonable access to relevant information, are . . . the best judges of what will promote their own welfare.”⁷⁰ Jolls and colleagues responded, however, that the behavioral law and economics literature demonstrates that people are likely worse at judging what will promote their own welfare than we have traditionally assumed. To the extent this is so, the objection to paternalistic policies is correspondingly weakened—“anti-antipaternalism.”⁷¹

Jolls and colleagues thus set out “a skepticism about antipaternalism but not an affirmative defense of paternalism.”⁷² In other articles, however, Sunstein and Thaler have extended this approach, suggesting that *some* sort of paternalistic intervention is in fact inevitable.⁷³ Again, they argued that often an organization or agent must make some choice that will affect the behavior and decision-making of others; therefore, to that extent, any such choice can be seen as paternalistic.⁷⁴ In a useful approach, Sunstein and Thaler documented various grades of paternalistic interventions—“minimal paternalism, required active choices, procedural constraints, and substantive constraints”⁷⁵—and set out broad suggestions for how to evaluate the propriety of any such policy using cost-benefit analysis.⁷⁶

In an article published about the same time as Sunstein and Thaler’s, Jeff Rachlinski also detailed a number of (primarily cognitive) errors, noting the potential paternalistic policies those errors seem to warrant.⁷⁷ Rachlinski suggested that policy makers cannot rely on “merely identifying . . . a cognitive [or emotional] error” to justify paternalistic intervention.⁷⁸ Rather, he too advocated cost-benefit analysis in evaluating such policies; specifically, “the costs of

70. *Id.* at 1541.

71. *Id.* at 1541-45.

72. *Id.* at 1541.

73. Sunstein & Thaler, *supra* note 9, at 1171.

74. *E.g.*, Sunstein & Thaler, *supra* note 9, at 1164, 1174. *But see supra* notes 25-31 and accompanying text.

75. Sunstein & Thaler, *supra* note 9, at 1167, 1188.

76. *Id.* at 1190-95.

77. Rachlinski, *Uncertain Psychological Case*, *supra* note 9.

78. *Id.* at 1225; *see id.* at 1168 (“Even heuristically driven individual choice can be trusted far more than legal scholars have realized, so long as individuals can learn better decisionmaking strategies or delegate their choices to those who have. Merely linking a cognitive bias in judgment to a decision that law could regulate should not support implementing a constraint on individual choice.”); Sunstein, *supra* note 49, at 1139 (“[T]he identification of defects in a system based on private preferences is a necessary but not sufficient condition for a regulatory solution.”).

either learning to adopt a superior approach to a choice or relying on others to make a choice” must outweigh the cost of the policy.⁷⁹ Thus, included in the assessment of the costs of a particular policy must be the difficulty involved in helping people learn to avoid or correct the bias at which that policy is aimed, and/or the costs of arranging for someone else to make the relevant decision.⁸⁰ Neither Professor Rachlinski nor other scholars, however, examined such costs in much detail.⁸¹

These commentators have focused primarily on the first line of scholarship challenging the traditional rational decisionmaker model—that is, the “Kahneman-Tversky,” cognitive heuristics and biases line. But there are a number of important contexts in which information about *emotional* biases, and about decisionmaking “under the influence” of emotion—all of which can lead to nonoptimal decisions—can have implications for third-party intervention into such decisions, or into the process of making them.

Little analysis of these topics exists, however, in the context of emotion. I recently made some speculative comments in a discussion of one particular emotional error involving affective forecasting (i.e., the prediction of future emotional states).⁸² Camerer and colleagues discuss various instances of “cooling-off periods,” in which policies are established that allow consumers to reconsider decisions made under the influence of emotional factors, presumably when they have returned to a cooler, more “rational” state⁸³ (as I point out below, however, cooling-off periods may in fact not be as effective as has been assumed). Sunstein and Thaler mention cooling-off periods as well, though their brief discussion is somewhat ambiguous as to whether the goal of such policies is to correct cognitive or emotional susceptibilities; Rachlinski gives a similar impression.⁸⁴ Similarly,

79. Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1219.

80. Cf. Sunstein & Ullmann-Margalit, *supra* note 59 (discussing steps individuals might take to arrange for others to make relevant decisions). Colin Camerer and colleagues recently made a similar argument to Rachlinski’s in documenting a range of errors in decisionmaking that might warrant paternalistic intervention, both in the private domain and by the state. Camerer et al., *supra* note 9. In recommending “asymmetric paternalism,” defined as regulation that benefits those who are subject to decisionmaking errors but that imposes little cost on those who make fully rational decisions, they acknowledge the importance of considering the “implementation costs” of a particular regulation or policy. *Id.* at 1212, 1219.

81. *Id.* at 1254 (calling for less debate over whether paternalism is justified and more empirical discussion of “whether the benefits of mistake prevention are larger than the harms imposed on rational people”); Sunstein, *supra* note 49, at 1173 (“To be justified, the governmental solution must make the situation better rather than worse.”).

82. Blumenthal, *Affective Forecasting*, *supra* note 4, at Part III.C.

83. Camerer et al., *supra* note 9, at 1238-47.

84. See Sunstein & Thaler, *supra* note 9, at 1188-89 (discussing cooling-off periods). Sunstein and Thaler discuss cooling-off periods as protecting against decisions made in “the heat of the moment” or when “emotions are likely to be running high”; still, they sug-

Sunstein's discussion of implications of individuals' inaccurate perception of risk,⁸⁵ in which he also draws inferences about interventions, has been sharply criticized for seeming to frame "fear" as too cognitive or rationalistic—that is, for reducing the emotion of fear to, in essence, cognitive misperception of risk.⁸⁶

Thus, what little work exists in this context has either been preliminary,⁸⁷ has focused primarily on cognitive biases, or has arguably conflated cognition and emotion.⁸⁸ It often focuses on intervention by private parties, rather than addressing potential governmental steps (legislative or judicial) to protect individuals from their errors.⁸⁹ Finally, much of this work has not considered in detail actual social science data about the emotions, about the biases or errors in decisionmaking to which emotions can lead, or about the effectiveness with which any of these biases might be corrected.⁹⁰ The remainder of this Article starts to remedy these gaps. I begin with a more detailed discussion of cognition and emotion in general, and of these cognitive and emotional biases in particular, including the implications those biases have for third-party, "protective" intervention.

gest that both "bounded rationality and bounded self-control" are the underlying concerns. *Id.* at 1189. The suggestion seems to have as much a cognitive focus as an emotional focus. Rachlinski raises cooling-off periods in the context of protecting against "cognitive strategies sales people might use to induce consumers to enter into transactions." Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1224 n.297.

85. Sunstein, *supra* note 11.

86. Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1 (2002). In a more recent book review, Sunstein does raise other effects of emotion on perceptions and decisionmaking. Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751 (2003) (reviewing HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT (Thomas Gilovich et al. eds., 2002)). Two of his suggestions are relevant here. First, he points to the phenomenon of probability neglect, noting that when a judgment about the outcome of a particular action is accompanied by strong emotion, or is otherwise heavily affect-laden, people's decisions about those outcomes are relatively impervious to changes in the probability of the outcome. *Id.* at 771; Sunstein, *supra* note 7, at 70-82. This phenomenon is discussed further below. Second, he suggests more broadly that emotions may act similarly to "low-level" or automatic cognitive judgments, "quick but error-prone," that can be corrected upon more conscious reflection. Sunstein, *Hazardous Heuristics*, *supra*, at 768-70. He notes, however, that such correction may be difficult, depending on the emotion. *Id.* at 771 ("[W]hen people are anxious and fearful, they are less likely to engage in systematic processing, and [such correction] is especially unreliable."). A more detailed discussion of such correction difficulties will figure prominently in Part IV, *infra*. See also Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22 (discussing this statement by Sunstein).

87. Blumenthal, *Affective Forecasting*, *supra* note 4, at 234-37.

88. See Sunstein, *supra* note 11; Sunstein & Thaler, *supra* note 9, at 1188-89.

89. *E.g.*, Sunstein & Thaler, *supra* note 9, at 1164-66 (discussing "paternalistic" steps by cafeteria supervisors at a business). But see *id.* at 1195-96 (describing Swiss intervention to try to improve pension fund investment).

90. *E.g.*, Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1070-71 nn.38-40 and accompanying text (2000); Sunstein, *supra* note 11, at 1140 nn.88-89 and accompanying text; Sunstein, *supra* note 7, at 66 n.26; Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1164 n.43 (2002).

III. IMPLICATIONS OF COGNITIVE AND EMOTIONAL BIASES FOR PATERNALISTIC INTERVENTION

The previous Part outlined some preliminary analysis applying social science research to justify the possibility of paternalistic policies (or at least responding to antipaternalistic objections to certain intervention). In this Part, I extend the discussion. First, I clarify my distinction between cognition and emotion in Part III.A. After summarizing in Part III.B some of the cognitive biases that have been identified, I proceed in Part III.C to a discussion of emotional biases. There, I first identify three important theoretical distinctions to consider. Using those distinctions as an underlying framework, I then discuss in more detail a number of emotional biases and their implications for paternalistic policies.

A. *Emotion and Cognition*

I particularly want to distinguish for present purposes—to the extent possible—between “cognition” or “cognitive processes,” and “emotion” or “emotional processes.” There are two primary justifications for doing so, especially in the context of examining paternalism. First, few previous treatments make the distinction. Second, and more important, doing so highlights differences between cognitive and emotional biases in terms of the ability to correct them. In turn, as I show in Part IV, differences in the correctability of emotional versus cognitive biases can have crucial implications for the likelihood of any intervention succeeding, as well as for the level of invasiveness necessary for such an intervention to succeed. That is, to the extent one type of bias might be easier to correct, less “interference” with individual decisionmaking might be necessary and the intervention will be more likely to succeed. Finally, the degree of interference and the potential for success both have important implications in turn for the tolerance with which a particular intervention is likely to be received by the target and by the public in general. These points are discussed in Parts IV and V.

To some extent, this distinction is artificial; emotional and cognitive or rational processes are somewhat related. This is especially relevant because the philosophical work on emotions most cited in law operates from this approach, arguing that emotions are typically based on some sort of beliefs or judgments about the world.⁹¹

Jon Elster, for instance, argues on the one hand that emotions typically “have cognitive antecedents. . . . [They] are triggered by be-

91. *E.g.*, ELSTER, *supra* note 4; NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 4.

liefs about events or states of the world.”⁹² On the other hand, Elster qualifies his view in a number of ways.⁹³ The most important is his discussion of neurobiological evidence showing that perceptual cues that give rise to emotional reactions—such as fear—can actually bypass conscious awareness. Specifically, there are two neural pathways from sensory areas to the amygdala, where a fear response occurs. One goes through the neocortex, where most conscious cognition occurs; but a second, “quick and dirty” one goes directly from the sensory areas to the amygdala.⁹⁴ For Elster, identifying preconscious or unconscious emotion demonstrates an independence of affect and cognition. Ultimately, however, the discussion is “not centrally important” to his project; it does not adequately reflect the emotional experiences of everyday life.⁹⁵ He is also not comfortable generalizing from these findings to all emotions (though he might be more comfortable if he looked to the substantial other evidence pointing to such rapid, preconscious emotional processing and influences⁹⁶).

The other influential approach from philosophy is Martha Nussbaum’s theory of emotions, which also grounds them in judgments or beliefs. Hers is perhaps a more extreme perspective than others’.

92. ELSTER, *supra* note 4, at 249-50; *see id.* at 254 (noting that cognitive antecedents of emotion include beliefs about one’s own emotions, probabilistic beliefs, and beliefs about others’ emotions, motivations, and beliefs). As a consequence, he argues, emotions may be rational or irrational when “well grounded in the evidence” or not. *Id.* at 250. Martha Nussbaum makes a similar point, arguing that emotions based on incorrect beliefs are “false” emotions. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 4, at 46. This contrasts sharply with some psychologists’ views, which suggest that “[c]ognitions can be evaluated for their correctness. . . . But preferences [and emotions] cannot be judged for accuracy or validity.” Robert B. Zajonc, *Emotions*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 591, 597 (Daniel T. Gilbert et al. eds., 1998).

Parts of Elster’s approach, and the first part of Nussbaum’s account (described below), reflect a line of emotion research in the social sciences (social psychology in particular) called “appraisal theory,” which suggests that emotions proceed from a person’s subjective evaluations of his circumstances. For a detailed review of appraisal theory, see Phoebe C. Ellsworth & Klaus R. Scherer, *Appraisal Processes in Emotion*, in HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 4, at 572.

93. First, he notes that the relationship between the cognitive antecedents and the emotional experience “is a matter of some controversy.” ELSTER, *supra* note 4, at 251. Second, he notes that his discussion can help distinguish between whether someone is experiencing “an emotion or something else, such as a cognition.” *Id.* at 246. Third, he notes that this approach may not be able to account for certain emotional experiences such as music appreciation. *Id.* at 245.

94. *Id.* at 268.

95. Moreover, it convinces him that appraisal theory, *see supra* note 92, is false. Appraisal theorists familiar with this objection, however, respond that the processes they suggest do not preclude low-level, subcortical evaluations. *E.g.*, Ellsworth & Scherer, *supra* note 92, at 585.

96. *See* Robert B. Zajonc, *Feeling and Thinking: Closing the Debate Over the Independence of Affect*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION, *supra* note 5, at 31.

suggesting explicitly that emotions are cognitive judgments.⁹⁷ What she means by this is, in part, that emotions involve “cognitive appraisals or evaluations” (a relatively uncontroversial assumption⁹⁸); but she also (in my view, overbroadly) implies that the very transmission of perceptual information in the brain that leads to an emotional experience renders the experience, at bottom, “cognitive.”⁹⁹ That is, for Professor Nussbaum, the visceral reaction Elster explained as showing that not all emotions have cognitive antecedents in fact shows that emotions are “cognitive.”¹⁰⁰

97. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 4, at 37. This summary of Nussbaum’s work, of course, drastically simplifies her analysis, but, I think, accurately characterizes her claim that emotions are at bottom “cognitive.”

98. See Ellsworth & Scherer, *supra* note 92.

99. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 4, at 4 (explicating her theory of emotions as, in part, suggesting that an emotion contains a “cognitive appraisal or evaluation” (emphasis omitted)); *id.* at 114 (suggesting that “the transmission of information” along certain neural pathways (even pathways that bypass areas of conscious judgment) suggests a cognitive basis for that theory of emotions). It is possible this is simply a matter of semantics: James Averill, whom Nussbaum cites approvingly, *id.* at 151 n.20, has elsewhere distinguished two meanings of “cognition.” See James R. Averill, *Emotions as Episodic Dispositions, Cognitive Schemas, and Transitory Social Roles: Steps Toward an Integrated Theory of Emotion*, in 3a PERSPECTIVES IN PERSONALITY: SELF AND EMOTION 139, 143-45 (D.J. Ozer et al. eds., 1990). The first is “intellective knowledge acquisition,” the conventional lay definition of cognition. Emotions are noncognitive under that view; that is, they are more value-laden, intuitive, and irrational. Emotions are “cognitive” in a second, broader, sense, under Averill’s second definition (which may be similar to Nussbaum’s)—“any nonbehavioral mental activity.” They are thus “cognitive” in the sense of being “mental processes.” See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 455 (2d ed. 1991).

100. Professor Nussbaum’s approach illustrates a tendency in legal discussions of the emotions to view them not only as conscious, but also as under conscious supervision or management of cognition. See Blumenthal, *supra* note 2, at 25-27 (noting this difficulty); Blumenthal, *Affective Forecasting*, *supra* note 4, at 161-62 (noting the same). A recent review of her work makes this point. Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1058 (2006) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004)) (noting that Professor Nussbaum “does not address” in her book “the fact that disgust, like many emotions, is usually automatic and unconscious”). Others have noted the management issue as well. *E.g.*, JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 19 (1996) (“While conscious control over emotions is weak, emotions can flood consciousness. This is so because the wiring of the brain at this point in our evolutionary history is such that connections from the emotional systems to the cognitive systems are stronger than connections from the cognitive systems to the emotional systems.”); Seymour Epstein & Rosemary Pacini, *Some Basic Issues Regarding Dual-Process Theories from the Perspective of Cognitive-Experiential Self-Theory*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 462, 475 (Shelly Chaiken & Yaacov Trope eds., 1999) (noting data “uniformly [showing] a direct influence of the [emotional] on the rational system, but not the reverse”); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 192 (2004) (“[W]here [conscious] thought conflicts with emotions, the latter is designed by the neural circuitry in our brains to win” (quoting RITA CARTER, *MAPPING THE MIND* 54 (1998))).

Another of Professor Elster’s examples illustrates this conscious/unconscious distinction. He discusses Norwegian workers in different industries: aluminum, fishing, and textile. In the former two, workers receive indirect wage subsidies; textiles workers receive direct

Again, legal discussion of emotion often relies on Elster's and Nussbaum's work.¹⁰¹ Thus, to the extent that their approaches frame emotion as primarily conscious and cognitive, the legal discussion suffers too. For instance, Professor Sunstein's book review of Paul Slovic's volume on fear and the perception of risk was sharply criticized as overcognitizing the emotion of fear, reducing it solely to the cognitive evaluation of risky outcomes.¹⁰² Whether or not the criticism accurately portrayed Sunstein's discussion,¹⁰³ fear clearly cannot be merely such cognitive evaluation, as there are any number of varieties of that emotion. The fear one experiences when considering a nuclear power plant mishap is almost certainly different, physiologically and phenomenologically, from the fear one might experience over being caught cheating on an exam, or over receiving a low grade on that exam.¹⁰⁴ And again, Joseph LeDoux's work demon-

wage subsidies. Elster argues that textiles workers feel envy for those working in the other two industries; those others, he implies, are proud not to be taking handouts, even though it is clear that their wages are being subsidized. He concludes that because the circumstances are framed differently—indirect versus direct subsidies—the emotions generated by the two situations are different: pride and shame. *See* ELSTER, *supra* note 4, at 252-53.

It is not clear, however, whether what the aluminum and fishing workers feel in reacting to the thought of the subsidies is in fact pride. It seems equally plausible that they recognize that they too are receiving subsidies from the government and are ashamed, but reconstrue the situation to put a positive spin on it. In both cases, what is felt is shame. *See id.* at 252 (“[A]ccepting wage subsidies is perceived to be like begging.”). The other workers are *conscious* of that shame, though, and take steps to reframe the situation into one in which shame is less warranted (i.e., indirect versus direct subsidy).

The point is important. For the aluminum and fishing workers, it is not necessarily the case that their initial emotional reaction is pride. Indeed, it is likely that they, like the textile workers, initially feel shame. In a deliberate attempt to feel better, however, they try to “manage their feelings.” When an emotional experience *and* its cause are brought to conscious awareness and there is time and ability to do so—which is not always the case—managing may be more possible. It is not the case, however, that emotions can be managed as easily as some commentators imply. *Cf.* Blumenthal, *supra* note 2, at 26 & n.189; Brian Rosebury, *On Punishing Emotions*, 16 *RATIO JURIS* 37, 43 (2003) (suggesting that certain psychological precursors of emotional judgments are “far less amenable . . . to conscious supervision”).

101. *See supra* note 4 and the sources cited *supra* note 90.

102. Moran, *supra* note 86, at 1-2.

103. Elsewhere, for instance, Professor Sunstein suggests that “[i]n the domain of risks, and most other places, emotional reactions are usually based on thinking; they are hardly cognition-free.” Sunstein, *supra* note 7, at 66. Moran is thus correct to suggest that Sunstein only “briefly touches on the biological foundation of fear and its relationship to higher cortical processes,” framing “emotion almost exclusively in relation to cognition.” Moran, *supra* note 86, at 4. Sunstein has elsewhere noted, however, that “‘affect’ [seems to come before risk or benefit assessments], and helps to ‘direct’ judgments of both risk and benefit.” Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 *MINN. L. REV.* 1556, 1564 (2004). He has also acknowledged the broader literature, for example, *infra* note 111, demonstrating that emotional responses often precede cognitive. Sunstein, *Moral Heuristics and Moral Framing*, *supra*, at 1563. (“A great deal of recent attention has been paid to the fact that people often have a rapid, largely affective response to objects and situations, including job applicants, consumer products, animals, cars, and causes of action.”). *But cf. infra* note 105 (suggesting that in his other work, Professor Sunstein is less clear).

104. *Cf. Zajonc, supra* note 92, at 601.

strates physiological triggers of fear reactions even before cognitive or perceptual identification of the fear stimulus.¹⁰⁵ Conversely of course, the perception of risk need not involve a fearful reaction or evaluation,¹⁰⁶ even though affect might be at the base of many judgments about emotionally-laden risky events.¹⁰⁷

It is clear that there is some interaction and even integration between the cognitive or rational system and the emotional or experiential system. But it is just as clear that what we refer to as emotions are distinct from rational or cognitive judgments and decisions—physiologically and phenomenologically, a “hot” state characterized by the experience of emotion is different from a “cold” state, characterized by calm, cool, dispassionate, rational judgment.¹⁰⁸ Substantial empirical evidence demonstrates the “independence of affect from cognition,”¹⁰⁹ and, more importantly, the very different behavior to which the two states can lead.¹¹⁰ Similar to the neurological evidence above, a variety of empirical studies demonstrates “affect primacy,” showing that an emotional state precedes and orients a cognitive state, often entirely outside of consciousness.¹¹¹ Additional evidence stems from the clear effect that incidental moods can have on

105. LEDOUX, *supra* note 100. Sunstein acknowledges this work. Sunstein, *supra* note 11, at 1140 n.90 and accompanying text; Sunstein, *supra* note 7, at 66 n.27 (“[S]ome types of emotions . . . can be triggered before the more cognitive sectors become involved at all.”). He continues without explanation in the latter, though, “[i]t is not true, however, that fear in human beings is generally precognitive or noncognitive, and even if it is in some cases, it is not clear that noncognitive fear would be triggered by most of the risks faced in everyday human lives.” *Id.* at 66 n.27. *But cf.* Sunstein, *supra* note 103, at 1564 (“‘[A]ffect’ [seems to come before risk or benefit assessments], and helps to ‘direct’ judgments of both risk and benefit.”).

106. *E.g.*, Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161 (documenting erroneous public perception of the health risks of eating fast food, though not in the context of emotional decisionmaking).

107. George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267 (2001).

108. *Cf.* Rottenstreich & Shu, *supra* note 4, at 458-59 (alluding to Loewenstein et al.’s work, *supra* note 107, to suggest that “[a]n extreme interpretation of [that research] would imply that there are two separate systems – an affective system and a perhaps more cognitive system”).

109. Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 3, at 397, 401. Psychologist Robert Zajonc has suggested fourteen fundamental differences between the two domains, including emotions’ cultural universality; the limited number of distinct emotions (as compared to an infinite number of distinct cognitions); the physiological primacy of emotional reactions; and the suggestion that cognitions are always “about something,” whereas emotions can exist without a direct referent (e.g., “free-floating anxiety”). Zajonc, *supra* note 92, at 596-97. Jaak Panksepp, another leading emotion psychologist, also identifies several distinctions between affective and cognitive processes. Jaak Panksepp, *At the Interface of the Affective, Behavioral, and Cognitive Neurosciences: Decoding the Emotional Feelings of the Brain*, 52 BRAIN & COGNITION 4 (2003).

110. *E.g.*, Loewenstein et al., *supra* note 107, at 267 (“[Empirical data] show that emotional reactions to risky situations often diverge from cognitive assessments of those risks. When such divergence occurs, emotional reactions often drive behavior.”). *See supra* note 100; *infra* Part III.C.

111. *See generally* Zajonc, *supra* note 92; Zajonc, *supra* note 96.

judgments and decisionmaking. A vast empirical literature demonstrates such effect on numerous social judgments, including legal and moral decisions.¹¹² Finally, striking evidence for two phenomenologically distinct systems comes from empirical studies showing that due to emotion and “gut” feelings, people behave as though certain low-probability events are less probable when represented by equivalent ratios of smaller numbers (1 in 10) than of larger numbers (10 in 100).¹¹³ That is, people saw the likelihood of Event X as greater when the probability was expressed as a 10 in 100 chance than when it was expressed as 1 in 10, and behaved accordingly. Even more striking, people behaved similarly when the other ratio for Event X ranged between 5 and 9 in 100.¹¹⁴ That is, despite objective information that Event X had, for instance, a 7 out of 100 chance of occurring versus a 1 in 10 chance, respondents chose and behaved as though the former were more likely. Respondents explained that rationally and objectively, they understood that the likelihood was lower; emotionally and subjectively, however, they felt they had a better chance when the absolute likelihood appeared higher (i.e., 7 chances rather than 1), and thus actually chose as though they had a better chance of obtaining X under those circumstances.¹¹⁵ Moreover, this tendency to respond nonoptimally was correlated with increased real-life gambling behavior.

112. For sources reviewing the extensive empirical data on the influence of incidental mood on other social and interpersonal judgments, see sources cited *supra* note 5. For experimental evidence of incidental mood's influence on moral judgments, see Blumenthal, *Mood and Moral Judgment*, *supra* note 4 (collecting studies and reporting new data).

113. E.g., Lee A. Kirkpatrick & Seymour Epstein, *Cognitive-Experiential Self-Theory and Subjective Probability: Further Evidence for Two Conceptual Systems*, 63 J. PERSONALITY & SOC. PSYCHOL. 534 (1992).

114. Veronika Denes-Raj & Seymour Epstein, *Conflict Between Intuitive and Rational Processing: When People Behave Against Their Better Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 819, 821-23 (1994); see Epstein & Pacini, *supra* note 100, at 466. In the Denes-Raj and Epstein experiment, subjects were presented with two rectangular platters of colored jellybeans. The small platter always contained 1 red and 9 white jellybeans; the large platter contained between 5 and 9 red jellybeans, and the remainder white to total 100. Denes-Raj & Epstein, *supra*, at 821. Subjects were instructed that by picking a red jellybean they would either win \$1.00 (win trial) or lose \$1.00 (lose trial). Though each platter was clearly labeled with the relevant proportion, such knowledge had little effect on many respondents' behavior.

There may be a connection between these findings and empirical research on the effect of framing a question as involving either frequencies (e.g., 10 out of 100) or probabilities (e.g., 10%), although the possibility has to my knowledge not been investigated. The different framing may affect the perception of the likelihood involved by influencing the associated emotional reaction. See, e.g., Paul Slovic et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 LAW & HUM. BEHAV. 271 (2000).

115. Denes-Raj & Epstein, *supra* note 114, at 823; Epstein & Pacini, *supra* note 100, at 466.

At bottom, I do not at all want to argue that there is a clearly demarcated break between cognition and emotion.¹¹⁶ But there are important differences between emotion and cognition that have consequences for paternalistic intervention. First and most important, people clearly behave differently when in “hot” and “cold” states, and even as the result of feelings they recognize as irrational. Second, emotion does have cognitive elements, in the sense of appraisals and identification of stimuli. But emotional reactions can often be quicker, outside consciousness, more automatic, less analytic, and less controllable, and need not always include such appraisal. The manageability of emotions may therefore be different than that of cognition.¹¹⁷

B. Cognitive Biases and Implications for Paternalism

Most of the previous discussion of paternalism and social science has thus been in the context of *cognitive* biases, the traditional line of heuristics and biases that affect judgments and decisionmaking.¹¹⁸ Commentators have cited a number of these biases as potentially, or actually, warranting third-party intervention in the decisionmaking process in order to protect individuals from such poor judgments. For instance, Sunstein discusses the “availability heuristic,” which leads individuals to mispredict the frequency or likelihood of easily imagined events, because the ease with which such an example is generated leads one to believe that it is common or likely.¹¹⁹ At a general level, he suggests that:

[a]n understanding of [this] heuristic bears directly on the debate over paternalistic interventions. If people believe that some risks are much higher than they actually are and that other risks are much lower than they actually are, their behavior will not promote their welfare. People will take excessive precautions to avoid trivial risks and they will fail to protect themselves against genuine hazards. Government has a legitimate role to play here; at a minimum, it should correct false beliefs. In some cases, government legitimately responds to people’s inability to process risk-

116. Indeed, I have suggested elsewhere that too sharp a distinction can be misleading. Blumenthal, *supra* note 2, at 25.

117. Of course, there is more automatic, less conscious cognition as well. See, e.g., Daniel M. Wegner & John A. Bargh, *Control and Automaticity in Social Life*, in HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 92, at 446; Daniel T. Gilbert et al., *On Cognitive Busyness: When Person Perceivers Meet Persons Perceived*, 54 J. PERSONALITY & SOC. PSYCHOL. 733 (1988).

118. Rachlinski, *Uncertain Psychological Case*, *supra* note 9, gives a good review, from which I draw here.

119. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974) (identifying and explaining the availability heuristic); Jolls et al., *supra* note 3, at 1477 (“[T]he frequency of some event is estimated by judging how easy it is to recall other instances of this type . . .”).

related information by constraining their choices, at least when the constraint ensures that they will do what they would do if they were adequately informed.¹²⁰

More specifically, the availability heuristic may lead to investors' overreliance on media reports of atypical investor success, and a belief that such success is there for the taking.¹²¹ Such "irrational exuberance," to coin a cliché, may warrant third-party intervention to dampen investors' ardor.¹²² Similarly, because breach of contract tends overall to be atypical, contracting parties might be vulnerable to the heuristic and mispredict the likelihood of breach (either overestimating or underestimating), leading some commentators to suggest intervention.¹²³ In quite another context, Elizabeth Scott has suggested that the availability heuristic is "the type of cognitive error most likely to distort premarital decisions," and is therefore one justification for developing precommitment strategies for individuals considering marriage.¹²⁴

Other cognitive biases have also led to calls for third-party intervention to protect individuals from their own decisionmaking. The

120. Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1302-03 (2003); cf. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 60-62 (1995).

121. Henry T. C. Hu, *Illiteracy and Intervention: Wholesale Derivatives, Retail Mutual Funds, and the Matter of Asset Class*, 84 GEO. L.J. 2319, 2369 (1996).

122. *Id.* (recommending government and/or regulatory intervention to remedy irrational investment tendencies).

123. One commentator condones judicial reluctance to enforce liquidated damages clauses, in part because of the availability heuristic. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1784 (2000). Eisenberg suggests, in part, that the typical absence of breach leads contracting parties to view contract fulfillment as the most available, and thus likely, outcome; therefore, the party will only underestimate the likelihood of a liquidated damages clause coming into play and therefore not fully evaluate the clause. *See id.* Indeed, one scholar suggests that courts behave so in any case. Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 735 (2000). In contrast, another author suggests that recent experience with a breach will lead a contracting party to overpredict that likelihood in the present contract, leading the author to emphasize "supra-compensatory" (i.e., liquidated or punitive) damages as a remedy. Larry A. DiMatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 705 (2001).

124. Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 63-64 (1990). Interestingly, Professor Scott frames the decisions about marriage and divorce as subject to cognitive errors such as the availability heuristic and cognitive dissonance, rather than emotional factors. She explicitly notes that these cognitive biases will only influence decisionmaking to the extent the decision process "is influenced by a calculation of costs." *Id.* at 44. Thus, she suggests, "[I]f the decision is based primarily on emotional impulse, then precommitment mechanisms would not function as predicted." *Id.* at 44 n.98. Professor Scott suggests that research from social psychology lends support to the notion that calculation of costs is involved in some of the relevant decisionmaking. *Id.* at 48 ("There is consensus that the individual considering divorce usually undertakes a cost-benefit calculation, comparing continued marriage with divorce.").

“hindsight bias”¹²⁵ may lead investors to overweight stocks’ past performance in predicting future performance, leading to poor investment decisions;¹²⁶ again, such tendencies may warrant intervention into investors’ decisionmaking.¹²⁷ The false consensus effect, or the tendency to project one’s own beliefs, attitudes, and character traits onto others, may lead to trust in inappropriate circumstances; for instance, an honest individual’s likelihood to enter into an unfair contract because he simply assumes that the other party is equally trustworthy.¹²⁸ Many such cognitive biases with the potential to lead to manipulated and/or inefficient contracts have led commentators to recommend stricter guidelines on who may enter into what contracts on which terms—approving of, or recommending more, paternalistic oversight of the market.¹²⁹

Finally, overoptimism could lead to inaccurate perception of various risks or skills: drivers may neglect to wear seat belts or motorcycle helmets, for instance, due to inflated views of their own driving skills; such inaccurate perceptions might plausibly lead to paternal-

125. Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975) (documenting bias). The bias is notoriously difficult to avoid or to correct. *E.g.*, Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311 (1990) (discussing difficulty of avoiding hindsight bias); Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89 (1995) (empirically demonstrating the difficulty of avoiding and correcting bias); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 586-88 (1998) (discussing difficulty of correcting hindsight bias). As sketched below, however, doing so is not impossible. *See infra* note 296.

126. Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation*, 41 VA. J. INT’L L. 815, 844 n.105 (2001) (“[I]nvestors may act with ‘hindsight bias,’ placing too much weight on past performance in projecting future performance.”). Nominally, Professor Choi makes this point in the context of arguments *against* investor regulation. *Id.* at 843-44. However, he points out that the danger of cognitive biases exists under the current, non-regulated regulatory system, and that the sort of regulation he proposes may help counter such biases. *Id.* at 844.

127. *See supra* notes 121-22. Note that this is different from the much more common instances where documenting the hindsight bias calls for limits on judges’ or juries’ decisionmaking. *E.g.*, Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. the Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 630 (1994) (suggesting a bifurcated trial); Jolls et al., *supra* note 3, at 1527 (suggesting manipulation of the information given to jurors); Rachlinski, *supra* note 125, at 606 (suggesting changing the standard of proof). There, under my present definition, such limits are not “paternalistic,” as they do not directly protect *an individual* from her *own* biased decisions; rather, they protect a defendant or the integrity of the judicial process from such biases. *Cf.* Blumenthal, *Affective Forecasting*, *supra* note 4, at 235 (making this distinction more generally).

128. *E.g.*, Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 365 (using this example as one of several demonstrating importance of emphasizing tort-based regulation of securities fraud, rather than contract-based).

129. *E.g.*, Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CAL. L. REV. 279, 300 (2000) (suggesting, in part based on discussion of cognitive errors, regulating access to investments).

istic intervention such as the installation of air bags regardless of the consumer's wishes.¹³⁰

Again, these are simply selected examples of *cognitive* biases identified by social scientists that have encouraged legal commentators in a number of contexts to make policy recommendations designed to protect individuals from the consequences of those biases. *Emotional* biases, however, have been discussed in less depth in the legal paternalism context; the next section begins to address that gap.

C. Emotional Biases and Implications for Paternalism

1. Framework and Distinctions

Low-level, basic emotions are essential, adaptive, rapid, and efficient. An important function is to orient us toward dangerous or other personally salient stimuli.¹³¹ Sometimes, however, such orientation leads to mistakenly identifying that salient stimulus as dangerous, under an evolutionarily adaptive “better-safe-than-sorry” approach. When that happens, an individual avoids something that might be beneficial, thus reducing welfare. Moreover, “free-floating” or incidental affect—affect unrelated to a judgment or decision at hand—can sometimes bias a decision or decisionmaking process.¹³² Emotion related to or evoked by a particular stimulus may also affect judgments and decisions relating to it. For all of these reasons, emotions are “a potential source of biased judgment and reckless action.”¹³³ In this section I review some of the affective (emotional) biases that empirical research has identified, connecting them to legal and policy circumstances and highlighting the potential each raises for paternalistic intervention.¹³⁴

Three distinctions will be especially relevant in this discussion. First, I distinguish between judgments and decisions involving (or

130. *E.g.*, Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747, 1753 (1998) (noting that where failure to wear seat belts stems from cognitive limitations, “an appropriate social corrective may take the decision about safety restraints out of the hands of the drivers and passengers and mandate the installation of passive restraints (such as air bags) that operate independently of any judgment made by those in the motor vehicle”).

131. Jorge L. Armony et al., *Computational Modeling of Emotion: Explorations Through the Anatomy and Physiology of Fear Conditioning*, 1 TRENDS IN COGNITIVE SCI. 28, 33 (1997); Loewenstein et al., *supra* note 107, at 268.

132. See sources cited *supra* note 5.

133. George F. Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 4, at 619, 620.

134. In some instances, law and policy have already “intervened,” recognizing, for instance, the usefulness of “cooling-off periods.” See Camerer et al., *supra* note 9, at 1238-47 (discussing such interventions); *infra* Part IV.B.3 (evaluating effectiveness of cooling-off periods). Similarly, in limited circumstances courts have recognized the difficulty of foreseeing future emotions. See Blumenthal, *Affective Forecasting*, *supra* note 4, at 209-14 (discussing surrogate mothering contracts).

based on, or predicting) emotions or emotional reactions,¹³⁵ and ones influenced by emotions at the time of judgment or decision.¹³⁶ This distinction connects closely with the question of intervening to correct emotional biases: as discussed more fully in Part IV.B, one (difficult) way to alleviate cognitive biases—for some people, for some judgments, and in some circumstances¹³⁷—is to draw an individual's attention to the potential bias.¹³⁸ The evidence is less clear for emotional biases, but it seems as though such intervention would succeed differently for the two sorts of judgments—less successful for ones involving or predicting emotions, more so for ones made under the influence of some affect.

Second, a useful distinction may be drawn between emotional biases stemming from active manipulation by others and ones resulting from the simple operation of biases and heuristics.¹³⁹ Some cases of emotional bias—in the realms of consumer decisions, family planning, or politics—reflect efforts to deliberately manipulate decisions by inducing emotions/moods that the manipulator hopes will bias decisionmaking.¹⁴⁰ Other cases, though, involve natural biases or er-

135. For instance, general judgments about expected utility, consumer judgments about preferences, or predictions of emotion to be experienced—"affective forecasting." See Blumenthal, *Affective Forecasting*, *supra* note 4.

136. For instance, the influence of concurrently experienced mood that is nevertheless unrelated to the judgment at hand. See, e.g., sources cited *supra* note 5. The distinction is similar to that made recently by George Loewenstein and colleagues between "expected" and "immediate" emotions, and their similar distinction between "anticipated" and "anticipatory" emotions. For the distinction between expected and immediate emotions, see Loewenstein & Lerner, *supra* note 133, at 620. For the similar distinction between anticipated and anticipatory emotions, see Loewenstein et al., *supra* note 107, at 267-68. The first in each of Loewenstein's pairs are emotions that are predicted to occur in the future, typically as the consequence of some decision outcome. The second reflects the influence of affect experienced concurrently with the decision or judgment being made and would include both those incidental mood effects noted above and effects stemming from emotion related to the judgment task.

137. The existence of individual differences in cognitive and emotional biases has led to some contention in the academic discussion. Compare Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002) (suggesting that individual differences in susceptibility to such biases lessens the usefulness of behavioral law and economics' policy suggestions), with Prentice, *supra* note 2, at 1722-44 (countering Mitchell's criticisms). See also Blumenthal, *supra* note 2, at 28-30 (discussing implications of individual differences for legal policy); Rachlinski, *Cognitive Errors*, *supra* note 9 (discussing implications of individual differences for paternalistic policies).

138. *Infra* Part IV.B.

139. Paul Slovic et al., *Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioral Economics*, 31 J. SOCIO-ECON. 329, 337 (2002).

140. E.g., Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22 (noting potential for emotional manipulation in context of abortion decisionmaking); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1444 (1999) ("[Atmospheric] factors . . . may be designed into or manipulated within retail spaces in order to produce emotional and, in turn, behavioral effects in consumers." (quoting GORDON R. FOXALL & RONALD E. GOLDSMITH, CONSUMER PSYCHOLOGY FOR MARKETING 189 (1994)); Marrow, *supra* note 43, at 26-34

rors, such as the tendency to make different judgments or evaluations when in a good mood versus a bad mood.¹⁴¹ Obviously the first is designed to capitalize on the second, but distinguishing them may suggest different views on the propriety of paternalism. People are likely more receptive to paternalistic policies designed to protect against one party taking advantage of another's tendencies toward emotional bias, such as advertisers' manipulation of emotion or unconscionable contract practices. However, people are likely less receptive to policies designed to guard against their own, especially unconscious, biases, seeing such policies as more intrusive than the former. Moreover, different policies or interventions—for instance, ex ante versus ex post—may be warranted depending on which sort of bias is to be corrected, and those different interventions may themselves be differently successful. For instance, ex ante intervention may be appropriate for naturally occurring biases, but these may be less successful than ex post intervention, such as by a court.

Third, for a number of empirical reasons, it is useful to distinguish between positive and negative emotions, as well as among different types of positive and negative emotions.¹⁴² Emotional processes, and thus the biases they may cause or be involved with, seem to differ based on the emotion's valence. For instance, people are relatively inaccurate at predicting the intensity and duration of their emotional reactions to future events.¹⁴³ However, people are actually better at predicting reactions to positive experiences than to negative ones (or, at least, not as inaccurate).¹⁴⁴ On the other hand, when we do make mistakes regarding future reactions to positive events (e.g., overestimating how much utility we will derive from such an event), we are not likely to learn from those mistakes;¹⁴⁵ but it is not clear

(identifying instances of contractual manipulation by taking advantage of cognitive and affective or "experiential" factors, although the discussion is primarily framed in terms of cognitive biases); Paul Bennett Marrow, *The Unconscionability of a Liquidated Damages Clause: A Practical Application of Behavioral Decision Theory*, 22 PACE L. REV. 27, 90-95 (2001) (containing a similar discussion); Daniel N. Shaviro, *Exchange on Public Choice*, 57 U. CHI. L. REV. 834, 836 (1990) (commenting on the article by Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990), and noting the ability of "politicians to manipulate [voters] with potent emotional symbols (ranging from race to 'competitiveness' to the flag) that often are only weakly related to underlying substance"); Note, *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092, 2102 (1996) ("Consumers in the market for infertility treatment may be especially vulnerable to emotional manipulation . . .").

141. See *infra* Part III.C.2.

142. Most discussion of law and the emotions has focused on negative emotions. See George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426, 426 n.1 (2000).

143. See Blumenthal, *Affective Forecasting*, *supra* note 4.

144. Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617, 626 (1998).

145. See Timothy D. Wilson et al., *Lessons from the Past: Do People Learn From Experience that Emotional Reactions are Short-Lived?*, 27 PERSONALITY & SOC. PSYCHOL.

whether we learn from erroneous predictions about negative emotions.¹⁴⁶ In other contexts, it appears that some corrective measures (again, such as drawing an individual's attention to her current mood) may be differentially successful for positive and negative mood biases.¹⁴⁷ More broadly, it has long been known that people in positive and negative moods process information differently, are differently persuadable, and articulate different attitudes, beliefs, and opinions.¹⁴⁸ Accordingly, in developing interventions, we may need to take into account different effects of positive and negative emotional contexts.¹⁴⁹

2. *Types of Emotional Biases*

The distinctions sketched above illustrate that applying empirical research to the paternalism question is more nuanced than previous discussions might suggest. The following discussion identifies a number of emotional biases, using these distinctions as an organizing

BULL. 1648 (2001); *see also* Norbert Schwarz, *Emotion, Cognition, and Decision Making*, 14 COGNITION & EMOTION 433, 437 (2000) ("Given individuals' general difficulties with the prediction of future feelings, one may hope that extensive experience with an affect-eliciting situation would increase the validity of predictions pertaining to future similar situations. Unfortunately, this hope is unwarranted . . . and memories of past feelings are themselves subject to systematic biases.").

146. Wilson et al., *supra* note 145, at 1650.

147. *See* Gerald J. Gorn et al., *Mood, Awareness, and Product Evaluation*, 2 J. CONSUMER PSYCHOL. 237 (1993) (drawing attention to mood state corrects bias for positive but not negative moods); Norbert Schwarz & Gerald Clore, *Mood, Misattribution, and Judgments of Well-Being: Informative and Directive Functions of Affective States*, 45 J. PERSONALITY & SOC. PSYCHOL. 513 (1983) (showing an opposite pattern).

148. *See* Blumenthal, *supra* note 2, at 50 (citing sources).

149. Similarly, we should distinguish *within* positive and negative emotions, that is, among different kinds of each. Traditionally, emotion research focused broadly on the effects of positive versus negative emotion. But increasingly, evidence shows that different emotions of the same valence can have quite different effects on cognitive processes. *See* David DeSteno et al., *Beyond Valence in the Perception of Likelihood: The Role of Emotion Specificity*, 78 J. PERSONALITY & SOC. PSYCHOL. 397 (2000); Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgement and Choice*, 14 COGNITION & EMOTION 473, 474-76 (2000); Larissa Z. Tiedens & Susan Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 81 J. PERSONALITY & SOC. PSYCHOL. 973 (2001). The negative emotions of fear, anger, sadness, and anxiety, for instance, can all lead to different risk perceptions, different likelihood estimates, and different influences of emotion. *See, e.g.*, Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146 (2001). And, of course, emotions of the same valence differ in their physiology, *e.g.*, Robert W. Levenson, *Autonomic Nervous System Differences Among Emotions*, 3 PSYCHOL. SCI. 23 (1992), and their phenomenology. These differences show that care need be taken in applying empirical emotion research to law and policy, as findings from some studies may not generalize to the legal context in question. Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99, 130 (2005) ("[I]n light of the finding that affective states of the same valence have distinct, predictable influences on persuasion, decision making, and motivation, how should the legal system account for specific emotions?").

framework. Specifically, in sections (a) and (b), I identify biases involving judgment about emotions and biases resulting from the influence of concurrently experienced emotion. In section (c) I briefly note the likelihood that detrimental decisionmaking based on such judgments may easily stem from the manipulation by others of the biases documented. For each example, I sketch some suggestions that have been or could be made for paternalistic interventions; both here and in the next Part, I address the potential success of such policies.

(a) *Biases Involving Judgments About Emotions*

i) *Affective Forecasting*

Surprisingly, although people are fairly good at predicting the *valence* of our future emotions, we are actually quite inaccurate when asked to predict the *intensity* and the *duration* of the emotional reaction.¹⁵⁰ In part this is because our predictions are often about unfamiliar events; and in part it is because we simply do not consider aspects of both ourselves and the outside world that, over time, tend to ameliorate the intensity and duration of emotional reactions. Susceptibility to such prediction errors has implications for medical decisionmaking,¹⁵¹ jury decisionmaking,¹⁵² contract law,¹⁵³ negotiation,¹⁵⁴ tax policy,¹⁵⁵ surrogate mothering,¹⁵⁶ custody and use of frozen embryos,¹⁵⁷ risk and other regulation,¹⁵⁸ and other contexts.

150. See generally Blumenthal, *Affective Forecasting*, *supra* note 4; see also Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 85-86 (noting individuals' inability to predict how they will feel in the future); Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQ. L. REV. 817, 818-19 (2004) (recognizing social science literature on affective forecasting); Mark Kelman, *Law and Behavioral Science: Conceptual Overviews*, 97 NW. U. L. REV. 1347, 1356 (2003) ("Consider also the important point made by behavioral social scientists who investigate hedonics: individuals invariably make concrete choices and establish short-term behavioral plans in expectation that the choices they make will make them happier than the ones they forego, but they may for a variety of reasons know very little about what has made them happy or will make them happy."); George Loewenstein & David Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 85 (Daniel Kahneman et al., eds., 1999); Leaf Van Boven & Joanne Kane, *Predicting Feelings Versus Choices*, in JUDGMENTS OVER TIME: THE INTERPLAY OF THOUGHTS, FEELINGS, AND BEHAVIORS 67 (Lawrence J. Sanna & Edward C. Chang eds., 2006) (reviewing such research).

151. *E.g.*, Blumenthal, *Affective Forecasting*, *supra* note 4, at 217-25.

152. *Id.* at 182-92 (discussing how prediction errors influence jury decisionmaking within various contexts).

153. *Id.* at 214 (discussing how prediction errors affect contract duties and liabilities).

154. Guthrie & Sally, *supra* note 150, at 821-27.

155. See Diane M. Ring, *Why Happiness?: A Commentary on Griffith's Progressive Taxation and Happiness*, 45 B.C. L. REV. 1413 (2004).

156. Blumenthal, *Affective Forecasting*, *supra* note 4, at 209-14; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1934 (1987) ("[P]erformance of surrogacy

In some of these legal and policy contexts, paternalism might be involved when a third party needs to intervene in order to privilege one set of an individual's preferences (Time₁) or the other (Time₂), or in order to protect an individual from the nonoptimal consequences to which biased decisionmaking might lead. Perhaps an obvious application is legislation outlawing suicide or limiting or prohibiting requests for euthanasia, based on observations by policymakers that individuals' preferences for such steps are likely to be emotionally biased.¹⁵⁹ On the other hand, such research may also point to a decreased need for paternalistic steps. For instance, Chris Guthrie has noted the relevance of affective forecasting research to governmental regulatory action in anticipation of some possible negative event (for example, terrorism or epidemics). He suggests that because actual harms may be less than anticipated harms, government infringement on autonomy, liberty, and other rights may be less warranted than it at first appears.¹⁶⁰ Further, government intervention to protect against decisionmaking biases might be less warranted if the actual harms that ensue from the biases are less than might be anticipated.

A more speculative context involves the emerging discussion of memory- and emotion-dampening drugs.¹⁶¹ Pharmacological research demonstrates that the drug propranolol can, in part, decrease the intensity of emotions associated with particular events.¹⁶² These findings may make those who have experienced traumatic events interested in taking propranolol, with the goal of "therapeutic forgetting." In a recent article, Adam Kolber discusses several of the legal and ethical issues arising from the possibility of such induced forgetting, addressing as well responses by the Presidential Council on Bioethics that were largely antipathetic to its use. Relevant here are a number of concerns by the Council, summarized by Professor Kolber as follows: memory dampening may "(1) prevent us from truly coming to terms with trauma, (2) tamper with our identities, leading us to a false sense of happiness, (3) demean the genuineness of human life and experience, (4) encourage us to forget memories that we are obligated to keep, and (5) inure us to the pain of others."¹⁶³ Although the

agreements by willing parties should be permitted, but women who change their minds should not be forced to perform.").

157. Blumenthal, *Affective Forecasting*, *supra* note 4, at 215-17.

158. *E.g.*, Chris Guthrie, *Risk Realization, Emotion, and Policy Making*, 69 MO. L. REV. 1039 (2004) (discussing how predictive errors put policy makers in an awkward position).

159. *Cf.* Blumenthal, *Affective Forecasting*, *supra* note 4, at 217-22 (discussing applications of affective forecasting research to euthanasia and advance directives).

160. Guthrie, *supra* note 158, at 1044-45.

161. See Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561 (2006).

162. *Id.* at 1574-77.

163. *Id.* at 1565-66.

Council did not directly call for prohibitions on the use of propranolol for therapeutic forgetting, these concerns demonstrate a clear skepticism and at least the potential for future attempts at paternalistic regulation.

Errors in affective forecasting are relevant to such a discussion. Again, individuals typically mispredict their future emotional reactions, typically overestimating the intensity and duration of those emotional states; such mispredictions are typically stronger for negative emotions than for positive. And again, in part this is because we underestimate our ability to cope with traumatic events. To the extent that this is so, the demand for memory dampening might be too high; people may overestimate the need to forget negative emotions by underestimating the degree to which those emotions will dissipate naturally over time.¹⁶⁴ The Council or other government actors might seek to use the affective forecasting research as a basis for paternalistically regulating the use of propranolol, in an effort to overcome arguments such as Professor Kolber's that are based, in part, on autonomy.¹⁶⁵

ii) *The Endowment Effect*

The endowment effect (EE), or the tendency to experience a "warm glow of ownership" and value a good or entitlement more highly when it is possessed, is a robust effect considered to significantly undercut basic assumptions of law and economics.¹⁶⁶ Traditional law and economics predicts that an individual's willingness to pay for a good should match her willingness to sell that good, and thus that the asking price and offer price should match. This prediction reflects basic assumptions underlying the Coase Theorem as well.¹⁶⁷ Nevertheless, the prediction has been shown false in a number of experimental and real-life settings; the price that individuals tend to demand to sell a good that they own is significantly higher

164. I do not discuss the application to those suffering from post-traumatic stress disorder (PTSD), which Professor Kolber discusses as a potential use for therapeutic forgetting. The affective forecasting literature has focused primarily on "healthy" subjects, that is, not on those suffering diagnosed disorders. Professor Kolber does address some of these issues. See, e.g., Kolber, *supra* note 161, at 1567-71.

165. *Id.* at 1566-67 (suggesting that the Council's arguments provide relatively weak grounds for wide-ranging legal restrictions on memory dampening and do not justify a broad legal restriction on the use of memory-dampening drugs and that "heavy-handed government prohibition of memory dampening is inappropriate"). I do not take a stand on the issue, but rather note the potential for paternalism raised by the convergence of the affective forecasting research and Professor Kolber's discussion of therapeutic forgetting.

166. Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326-29 (1990).

167. *Id.*

than the amount they would be willing to offer to buy it.¹⁶⁸ The effect is generally attributed to “loss aversion,” where to lose something of a given magnitude causes a larger decrease in utility than the increase in utility that gaining a good of that magnitude would cause.¹⁶⁹

This effect—considered by some the most important empirical contribution that behavioral law and economics has made¹⁷⁰—stems in large part from emotional, as opposed to cognitive, factors. A recent review of why the EE occurs emphasized four potential explanations, all with emotional underpinnings: (1) “pure” loss aversion, where to lose something “simply hurts more” than not receiving it—an illogical bias that simply reflects “difference[s] in emotional content;” (2) “attachment,” where simply owning an entitlement adds value, sentimental or otherwise, over and above the entitlement’s pure “commodity status;” (3) a “regret avoidance” hypothesis, reflecting the notion that “giving up an entitlement is more likely to cause future regret than not obtaining an entitlement;” and (4) the “disutility” of selling, where simply participating in a sale of the entitlement causes dysphoria, especially when that sale involves inappropriately commodifying that entitlement.¹⁷¹ As an empirical matter, such reluctance to commodify, or preference for nonfungible possessions, does seem to underlie many of the EE findings: two recent meta-analytic reviews of EE studies demonstrated that the less a possession is like an “ordinary market good,” the more likely it is that the EE will occur.¹⁷² Recent experimental research lends further

168. *Id.* For reviews of studies, see John K. Horowitz & Kenneth E. McConnell, *A Review of WTA / WTP Studies*, 44 J. ENVTL. ECON. & MGMT. 426 (2002) (reviewing forty-five studies); Serdar Sayman & Ayşe Öncüler, *Effects of Study Design Characteristics on the WTA-WTP Disparity: A Meta Analytical Framework*, 26 J. ECON. PSYCHOL. 289 (2005) (reviewing thirty-nine studies).

169. Kahneman et al., *supra* note 166, at 1326-27; Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1250 (2003); Leaf Van Boven et al., *Egocentric Empathy Gaps Between Owners and Buyers: Misperceptions of the Endowment Effect*, 79 J. PERSONALITY & SOC. PSYCHOL. 66, 66 (2000).

170. *E.g.*, Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1735 (1998); Korobkin, *supra* note 169, at 1229.

171. *Id.* at 1250-55.

172. Horowitz & McConnell, *supra* note 168, at 427 (reviewing forty-five studies and finding that EE is highest for nonmarket goods and lowest for various forms of money, with “ordinary private goods” falling somewhere in between); Sayman & Öncüler, *supra* note 168, at 304 tbl.2 (reviewing thirty-nine studies and finding that similarity of good to “market good” was negatively correlated with strength of EE, and “perceived illegitimacy” of transaction was positively correlated with strength of EE); *see also* Kahneman et al., *supra* note 166, at 1344 (noting that EE reflects an unwillingness to sell, but little unwillingness to buy, suggesting that what is involved is parting with a good, rather than with money). More precisely, the meta-analyses reviewed studies examining the disparity between the willingness to pay for a good or entitlement and the willingness to accept some compensation for that same good or entitlement. The endowment effect reflects that disparity. *See, e.g., id.* at 1342 (“The endowment effect is one explanation for the systematic

credence to the role of emotional reactions or regret avoidance in the EE, finding a correlation between the perceived “importance” of a possession and the degree of loss aversion.¹⁷³ Because potential market participants’ EE or disparity between willingness to pay and willingness to accept leads to undertrading and thus likely market inefficiencies, third-party intervention to attenuate the effect might be appropriate.¹⁷⁴

Alternatively, intervention might be designed (in good faith or not) in order to take advantage of the EE. Good faith intervenors might provide goods to individuals precisely because their initial preferences will be changed once they own that good.¹⁷⁵ The obverse, a less innocuous step, might be to provide individuals with a good less valuable than they might deserve or desire, under the assumption that through the EE and other mechanisms they will come to value it more.¹⁷⁶

Note that an underexplored issue, amenable to empirical investigation, involves the interaction between these two emotional effects: affective forecasting and the endowment effect. For instance, is the pain of losing an owned good (or the utility of maintaining possession) less than we anticipate?¹⁷⁷ Furthermore, if we realized this, how might it affect our selling price? To what extent, then, might educational intervention attenuate the endowment effect?

iii) *Probability Neglect*

As noted above in Part III.A, Seymour Epstein and colleagues have documented differences between what they call the “cognitive” system (rational maximizing analysis) and the “experiential” system (intuitive, emotional analysis). In particular, they noted the differences in judgment and behavior to which the two systems can lead, and the likelihood of nonoptimal outcomes when the latter system is used.¹⁷⁸ Substantial other empirical evidence shows *probability neglect*—when a judgment about the outcome of a particular action is

differences between buying and selling prices that have been observed so often in past work.”).

173. See Eric J. Johnson et al., Exploring the Nature of Loss Aversion 23-24 (unpublished manuscript, on file with author).

174. Sunstein, *supra* note 49, at 1172 (arguing that the endowment effect and related biases may support “considerable legislative and judicial intrusion into private preference structures”).

175. *Id.* at 1152.

176. Or, “the legal system might remove goods from someone who currently has them, even if that person values those goods, in the expectation that he might not miss them after they have been taken.” *Id.*

177. For some such research, see George Loewenstein & Daniel Adler, *A Bias in the Prediction of Tastes*, 105 ECON. J. 929 (1995).

178. See Denes-Raj & Epstein, *supra* note 114; Epstein & Pacini, *supra* note 100; Kirkpatrick & Epstein, *supra* note 113.

accompanied by strong emotion, or is otherwise heavily affect-laden, people's decisions about those outcomes are relatively impervious to changes in the probability of the outcome.¹⁷⁹ Traditional expected-utility theory predicts that decisions should be relatively sensitive to outcome probability—that is, the utility of a particular outcome should be weighted by the likelihood that it will occur. The data, however, show that when an outcome is emotionally-laden, and especially when that outcome is vivid or made especially salient, people are highly insensitive to variations in probability.

In one study, for instance, subjects were asked to report the highest amount of money that they would pay to avoid a particular unpleasant outcome that occurred with varying degrees of likelihood.¹⁸⁰ The unpleasant outcome was either fairly neutral (the loss of \$20) or vividly unpleasant (a brief but painful electrical shock). Subjects presented with varying possibilities of a \$20 loss varied relatively predictably with the likelihood of the loss: for a 1% chance they were willing to pay a maximum of \$1; for a 99% chance they would pay up to \$18. To avoid the shock, however, the maximum subjects would pay rose only from \$7 (for a 1% chance of shock) to \$10 (for a 99% chance).¹⁸¹ Whatever one might say about the subjects' perceptions of those outcomes, it is clear that the impact of probability depended on the nature of the outcome. People seem to be willing to pay significant amounts to avoid emotionally unpleasant outcomes, but the amount they will pay does not seem to vary much as the probability increases. Refining these findings in more recent research, Hsee and Rottenstreich show that in nonemotional states—that is, when people focus on more rational calculation—people are relatively more sensitive to changes in probabilities or scope, consistent with expected utility theory.¹⁸² According to Hsee and Rottenstreich, under emotional states, probabilities also matter, but only at the extremes; that is, people are sensitive to the presence or absence of the possibility (that is, a change from 0% to some small percentage or, with less conclusive support, from a large percentage to certainty), but not at levels in between.¹⁸³ Epstein's findings, however, show that even such explicit attention to calculation does not always alleviate the shortcomings of experiential decisionmaking: recall the individuals who

179. See Loewenstein et al., *supra* note 107, at 276-78; Sunstein, *supra* note 7, at 67.

180. Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 PSYCHOL. SCI. 185, 188 (1999).

181. *Id.*

182. That is, focusing on more formulaic analysis of value, taking into account both the nature and the scope of a stimulus, rather than determining preference simply by evaluating one's feelings toward that stimulus. See Christopher K. Hsee & Yuval Rottenstreich, *Music, Pandas, and Muggers: On the Affective Psychology of Value*, 133 J. EXPERIMENTAL PSYCHOL.: GEN. 23, 23-24 (2004).

183. *Id.* at 28.

insisted that they had a “better” chance of a favorable decision outcome when their chances of success were 7 out of 100 than 1 out of 10.¹⁸⁴

Professor Sunstein illustrates legal and policy implications of this bias, suggesting that “the demand for legal intervention can be greatly affected by probability neglect, so that government may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that the relevant dangers will ever come to fruition.”¹⁸⁵ In areas of administrative law, jury decisionmaking, regulatory legislation, and others, he notes the difficulties and implications involved in developing third-party interventions, ultimately recommending “information and education,” along with cost-benefit analysis of proposed interventions if stronger measures become necessary.¹⁸⁶ As I discuss below, however, “information and education” are not always effective remedies for bias.¹⁸⁷

(b) *Biases Involving Immediate or Incidental Emotions*

The biases above involve judgments about emotionally-laden events or tasks. But emotion and mood also directly influence ordinary decisionmaking when decisions or judgments are made while in an emotional state. This is especially so when the affective state is triggered by a stimulus unrelated to the target of the task at hand.

i) *Affect Infusion*

A substantial body of empirical research shows that both decisions and decisionmaking processes can be influenced by emotions at the time of judgment or decision.¹⁸⁸ In some cases the emotion will be elicited by the decision at hand or circumstances surrounding it—for instance, juries swayed by compassion elicited by victim impact statements or by disgust induced by gruesome photographs placed into evidence.¹⁸⁹ In other instances—equally, if not more interest-

184. Denes-Raj & Epstein, *supra* note 114, at 821-22.

185. Sunstein, *supra* note 7, at 68.

186. *Id.* at 106-07.

187. *See infra* Part IV.B.

188. *See* Shelly Chaiken, *The Heuristic Model of Persuasion*, in SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM, VOLUME 5, 3 (Mark P. Zanna et al. eds., 1987) (identifying effects of incidental mood on persuasion); Schwarz, *supra* note 145, at 433-34 (collecting studies); *see also supra* note 5 (listing sources).

189. For studies examining the impact of gruesome photographs see, for example, David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-making*, 30 LAW & HUM. BEHAV. 183 (2006) (showing impact of gruesome photographs on mock jurors' emotional responses and on verdicts); Kevin S. Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM. BEHAV. 485, 499-500 (1997)

ing—the emotion (or mood) will be incidental to the decision but nevertheless influences it.¹⁹⁰

These effects manifest in a number of ways. Mood-congruent memories are more easily retrieved than memories incongruent with one's current emotional state.¹⁹¹ Mood-congruent judgments are often made via a “how-do-I-feel-about-it” heuristic, with individuals in positive moods evaluating a target more favorably than those in negative moods.¹⁹² Mood can affect perceptions of mood-congruent probabilities, with people in positive moods predicting a higher likelihood of positive events or outcomes than of negative ones.¹⁹³ And one of the most robust findings in the emotions literature is the effect mood has on processing strategy—in particular, how deeply a person processes information. Broadly speaking, individuals in positive moods tend to process information more superficially or heuristically, tend to rely more on stereotypes, and are more easily persuaded than individuals in negative moods.¹⁹⁴ These mood effects—also called “affect infusion,” as the decisionmaking process becomes “infused” with the unrelated mood being experienced¹⁹⁵—can depend on the sort of judgment being made. Briefly (and perhaps counterintuitively), when a judgment is more *constructive*, entailing more effort and processing, affect infusion is *more* likely (probably because there is more processing going on for mood to become involved in).¹⁹⁶ In contrast,

(finding that photographs influenced verdicts even though mock jurors thought they should not and did not). For victim impact research see, for example, Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL., CRIME & L. 331 (1999); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995); Bryan Myers et al., *Victim Impact Testimony and Juror Judgments: The Effects of Harm Information and Witness Demeanor*, 32 J. APPLIED SOC. PSYCHOL. 2393 (2002); see generally Jean M. Callihan, *Victim Impact Statements in Capital Trials: A Selected Bibliography*, 88 CORNELL L. REV. 569, 573-74 (2003) (listing studies).

190. See generally *supra* note 5 (listing sources).

191. E.g., Henry C. Ellis & Brent A. Moore, *Mood and Memory*, in HANDBOOK OF COGNITION AND EMOTION 193 (Tim Dalgleish & Mick J. Power eds., 1999); Klaus Fiedler et al., *Is Mood Congruency an Effect of Genuine Memory or Response Bias?*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 201, 201 (2001).

192. See, e.g., Schwarz, *supra* note 5; Norbert Schwarz & Gerald L. Clore, *How Do I Feel About It? The Informative Function of Affective States*, in AFFECT, COGNITION AND SOCIAL BEHAVIOR: NEW EVIDENCE AND INTEGRATIVE ATTEMPTS 44 (Klaus Fiedler & Joseph Forgas eds., 1988).

193. See, e.g., Thomas E. Nygren et al., *The Influence of Positive Affect on the Decision Rule in Risk Situations: Focus on Outcome (and Especially Avoidance of Loss) Rather Than Probability*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 59 (1996).

194. See *supra* note 5 and accompanying text. Note, though, that consistent with the distinction made above, such results can differ depending on which negative mood is induced. See, e.g., Schwarz, *supra* note 145, at 434; Tiedens & Linton, *supra* note 149, at 973-74.

195. See Joseph P. Forgas, *Affective Influences on Attitudes and Judgments*, in HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 4, at 596, 612.

196. *Id.* at 612-13.

when a judgment involves the simple retrieval of existing, especially “crystallized” knowledge or attitudes (a simpler process), then affect infusion is *less* likely.¹⁹⁷ Understanding that a potential emotional bias may depend on the decision task at hand helps determine whether and when corrective intervention may be relevant.¹⁹⁸

Judgments and decisionmaking may be influenced by incidental mood, but examples also abound of mood influencing behaviors relevant to paternalism—both self- and other-related. For instance, women dieters (“restrained eaters”) who watched film clips inducing both positive and negative emotions tended to eat more while watching the clips, demonstrating that such emotional arousal somehow disinhibited women’s food-related restraint.¹⁹⁹ Positive mood unrelated to the substance of negotiations can lead to more cooperative strategies and, by some criteria, more successful negotiations.²⁰⁰ Negative mood usually (but not necessarily) leads to less helping behavior than positive mood.²⁰¹ Relatedly, decisionmakers charged with distributive welfare tasks can be subject to mood effects; induced empathy can lead to increased and objectively unfair shares of allocated goods.²⁰² And directly relevant to employment and other sorts of discrimination, individuals in a positive mood are more likely to use stereotypes in judging others.²⁰³ Some interventions might be

197. *Id.* at 612.

198. Blumenthal, *Mood and Moral Judgment*, *supra* note 4, at 14-17 (documenting the impact of immediate, incidental mood on moral judgments). There I suggest that at first blush, such findings may indicate strong paternalistic policies such as requiring voters to watch a particular mood-inducing movie before voting (or, analogously, require jurors to watch some such video before their verdict), in order to avoid superficial decisionmaking. *Id.* at 23. I note, however, that the fact that voting often consists of simply acting on established, crystallized judgments meets this proposal. *Id.* at 23-24; Blumenthal, *supra* note 2, at 50-51.

199. *E.g.*, Joseph Cools et al., *Emotional Arousal and Overeating in Restrained Eaters*, 101 J. ABNORMAL PSYCHOL. 348 (1992) (documenting that both positive and negative emotional arousal triggered overeating in restrained eaters); David E. Schotte et al., *Film-Induced Negative Affect Triggers Overeating in Restrained Eaters*, 99 J. ABNORMAL PSYCHOL. 317 (1990) (discussing how negative emotional arousal triggered overeating in restrained eaters); *cf.* Laurette Dubé et al., *Affect Asymmetry and Comfort Food Consumption*, 86 PHYSIOLOGY & BEHAV. 559, 560 (2005) (documenting that positive emotional states lead to comfort food consumption for men and negative emotional states lead to comfort food consumption for women).

200. Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOC. PSYCHOL. 565, 566-67 (1998). Note that this is different from more common examples of emotion that stem from the bargaining itself having an influence on the process and substance of negotiations.

201. *See* Blumenthal, *Mood and Moral Judgment*, *supra* note 4, at 4-5 nn.21-22 (citing studies).

202. *E.g.*, C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 1042, 1042 (1995).

203. Andrea Abele et al., *Positive Mood and In-Group—Out-Group Differentiation in a Minimal Group Setting*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 1343, 1343 (1998); Herbert Bless et al., *Mood and the Impact of Category Membership and Individuating Infor-*

geared toward ameliorating such mood effects; these might simply involve drawing attention to the relevant mood. That is, research shows that incidental mood can affect judgments through the “how-do-I-feel-about-it” heuristic, where an existing mood is used as a proxy for one’s feelings toward or judgments about a target.²⁰⁴ When an individual is made aware of that incidental mood, its relevance as a proxy is removed and, at least in theory, the individual can then make unbiased judgments.²⁰⁵ In practice, however, as discussed more fully in Part IV, such corrections are not always effective and, as with many debiasing efforts, can in fact be counterproductive, due to overcorrection, rebound effects, or other concerns.

Other interventions might take advantage of the bias—for instance, by encouraging or even mandating people to engage in mental or physical activities that elevate mood (such as meditation or physical exercise) in order to reap the welfare benefits of being in a positive mood.²⁰⁶ Scholars and policymakers are beginning to discuss this sort of “positive paternalism.”²⁰⁷

ii) Risk Perception

As alluded to earlier, immediately experienced emotions—positive or negative—can bias people’s perceptions of risk, including judgments of the likelihood of risky events. The absence of emotional experience can do so as well. Mid-twentieth century neurosurgeons, for

mation, 26 EUR. J. SOC. PSYCHOL. 935, 936 (1996); Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994). Even this can depend on the specific emotion; some negative emotions (such as anger or anxiety) in fact increase the use of stereotypes, while others (such as sadness) decrease it. See Galen V. Bodenhausen et al., *Negative Affect and Social Judgment: The Differential Impact of Anger and Sadness*, 24 EUR. J. SOC. PSYCHOL. 45 (1994); Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740 (1993); Rajagopal Raghunathan & Michel Tuan Pham, *All Negative Moods Are Not Equal: Motivational Influences of Anxiety and Sadness on Decision Making*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 56 (1999).

204. See, e.g., *supra* note 192 and accompanying text.

205. See, e.g., Schwarz & Clore, *supra* note 147.

206. I thank Chris Guthrie for pointing out this possibility, though I do not know whether he would endorse it. A potential difficulty, however, as sketched further below, is the loss of judgmental benefits of being in a *negative* mood: recall that some such moods can in fact improve some judgment accuracy, reduce the use of stereotypes, etc. See *supra* note 194 and accompanying text.

207. See Huang & Blumenthal, *Positive Law and Policy*, *supra* note 32; Huang & Blumenthal, *Positive Policy/Positive Institutions*, *supra* note 32; Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319 (2007). At least one expert in emotion research has noted, though not in a paternalism context, the potential usefulness of “field experiments [testing] the psychological, social, and physical outcomes of interventions aimed at cultivating positive emotions in daily life.” Barbara L. Fredrickson, *Positive Emotions*, in HANDBOOK OF POSITIVE PSYCHOLOGY 120, 131 (C.R. Snyder & Shane J. Lopez eds., 2002). Some such research exists. See generally Martin E.P. Seligman et al., *Positive Psychology Progress: Empirical Validation of Interventions*, 60 AM. PSYCHOLOGIST 410 (2005) (reviewing recent developments in the field of positive psychology).

instance, found that patients who underwent frontal lobotomies—an operation removing much of the areas apparently necessary for imagining the emotional effect of future outcomes—seemed to be more impulsive than others and more prone to risk taking.²⁰⁸ More recently, Damasio and colleagues have identified patients suffering from damage to high-level cortical areas involving emotion who, though understanding the probabilities involved in gambling games presented to them, nevertheless tended to make risky decisions and go bankrupt more often than nondamaged patients.²⁰⁹

When emotions are present, whether related or unrelated to the judgment at hand, the dynamics of actual affective influence are somewhat complex. Initial research on unrelated affect showed a tendency for mood-congruent judgments; individuals induced to feel negative affect made more pessimistic estimates about frequencies of death, for instance, than those placed in a positive mood. That research also showed that people in positive moods tended to be more optimistic, overestimating the likelihood of positive events and underestimating that of negative events.²¹⁰ On the other hand, those same happy people tended to be more cautious or conservative than others in actual gambling or other risk-based behavior, especially when there was a risk of large or even moderate loss.²¹¹ Further research in this line showed that negative moods can also lead to biased perceptions of risk.²¹² But negative moods can do so in a variety of ways. For instance, fear can lead to pessimistic risk estimates and risk-averse choices, while anger can lead to more optimistic estimates and risk-seeking choices.²¹³

208. WALTER FREEMAN & JAMES W. WATTS, *PSYCHOSURGERY: INTELLIGENCE, EMOTION AND SOCIAL BEHAVIOR FOLLOWING PREFRONTAL LOBOTOMY FOR MENTAL DISORDERS* 303 (1942).

209. See, e.g., Antoine Bechara et al., *Deciding Advantageously Before Knowing the Advantageous Strategy*, 275 SCI. 1293 (1997).

210. See Eric J. Johnson & Amos Tversky, *Affect, Generalization, and the Perception of Risk*, 45 J. PERSONALITY & SOC. PSYCHOL. 20 (1983); John D. Mayer et al., *Mood-Congruent Judgment is a General Effect*, 63 J. PERSONALITY & SOC. PSYCHOL. 119 (1992). Relatedly, a “wishful thinking” phenomenon, similar to an optimism bias, has long been documented, in which desired or desirable events are considered more likely. See Douglas McGregor, *The Major Determinants of the Prediction of Social Events*, 33 J. ABNORMAL & SOC. PSYCHOL. 179 (1938).

211. See Hal R. Arkes et al., *The Role of Potential Loss in the Influence of Affect on Risk-Taking Behavior*, 42 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181 (1988); Alice M. Isen et al., *Influence of Positive Affect on the Subjective Utility of Gains and Losses: It Is Just Not Worth the Risk*, 55 J. PERSONALITY & SOC. PSYCHOL. 710 (1988); Alice M. Isen & Robert Patrick, *The Effect of Positive Feeling on Risk-Taking: When the Chips are Down*, 31 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 194 (1983).

212. See, e.g., Johnson & Tversky, *supra* note 210; William F. Wright & Gordon H. Bower, *Mood Effects on Subjective Probability Assessment*, 52 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 276 (1992).

213. Lerner & Keltner, *supra* note 149, at 480-87.

As Professor Sunstein suggests, when emotions are related to the risk judgment at hand, the emotion-inducing “vivid images and concrete pictures of disaster can ‘crowd out’ other kinds of thoughts, including the crucial thought that the probability of disaster is very small.”²¹⁴ All of these emotionally driven misperceptions of risk may warrant intervention in order to key legislative action to the actual, not the perceived, risk.²¹⁵ And in the context of emotional judgments, there is some empirical justification for such intervention: specifically, predictions of *others’* risk preferences—in which we ordinarily see others as more risk-seeking—are actually more accurate when the target of prediction is vivid.²¹⁶

Much previous discussion on public perception (and misperception) of risk has focused on cognitive biases such as the availability bias.²¹⁷ However, the possibility that emotion has a stronger effect than cognition on perceptions of risk may lead to different approaches to policy intervention. The literature has also constrained itself to broad, valence-based framing of emotion, without differentiating among similarly valenced emotions. Making such distinctions can help identify appropriate interventions.

iii) *Hot/Cold Empathy Gaps*

Related to the affective forecasting literature,²¹⁸ substantial research has identified “hot/cold empathy gaps,” that is, the (fairly intuitive) tendency for people in an emotional state to make inaccurate predictions about how they would behave when in a nonemotional state (and vice versa). In a classic study, for instance, women who one month before giving birth strongly disapproved of the use of anesthesia during delivery—and who repeated such preferences even during early labor—nevertheless changed those attitudes during ac-

214. Sunstein, *supra* note 7, at 82.

215. Amitai Aviram discusses an important related aspect of such intervention, the “placebo effect” of legislation. See Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006). There, the issue is legislative action that is paternalistic in the sense of changing public perception about, for instance, the risk of disaster, even though the legislation might be primarily or even wholly symbolic (that is, the legislation may not affect the actual risk). *Id.* His discussion is largely framed in cognitive terms.

216. Christopher K. Hsee & Elke U. Weber, *A Fundamental Prediction Error: Self-Others Discrepancies in Risk Preference*, 126 J. EXPERIMENTAL PSYCHOL.: GEN. 45 (1997). Vividness here meant that the predictor could see the target about whose risk preferences predictions were being made, even when the predictor did not know or interact with the target. *Id.*

217. See, e.g., Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

218. See *supra* Part III.C.2.a.i.

tive labor and requested anesthesia.²¹⁹ In other research, male study subjects who were sexually aroused predicted behaving in a more sexually aggressive way in dating scenarios and reported a higher likelihood of engaging in unsafe sex than nonaroused subjects.²²⁰ Without providing proof of behavior, these latter findings are consistent with the idea that nonaroused (“cold”) subjects inaccurately imagine how they might behave when aroused.²²¹ Similarly, these empathy gaps have also been found to be relevant to the likelihood of certain sexual behavior, including the probability that teenagers²²² or gay men²²³ would use contraceptives in sexual situations. As another example, drug addicts who abstain from drugs for a period of time may overestimate their resistance to relapse. Even a small amount of drug use can easily lead to even more craving and to relapse.²²⁴ A number of creative and interesting suggestions have been made recently to address such emotionally-based, time-inconsistent preferences, including smoking licenses,²²⁵ suicide “notification” practices,²²⁶ or various forms of “cooling off.”²²⁷

Each such suggestion, of course, involves some level of paternalism, though many of these authors are at pains to minimize the paternalistic nature of the intervention. One set of commentators more

219. See Jay J.J. Christensen-Szalanski, *Discount Functions and the Measurement of Patients' Values: Women's Decisions During Child Birth*, 4 MED. DECISION MAKING 47 (1984).

220. See Dan Ariely & George Loewenstein, *The Heat of the Moment: The Effect of Sexual Arousal on Sexual Decision Making*, 19 J. BEHAV. DECISION MAKING 87 (2006); George Loewenstein et al., *The Effect of Sexual Arousal on Expectations of Sexual Forcefulness*, 34 J. RES. IN CRIME & DELINQUENCY 443 (1997).

221. See Van Boven & Kane, *supra* note 150 (reviewing substantial research showing that individuals in an unaroused emotional state overestimate the influence of affective factors).

222. See, e.g., George Loewenstein & Frank Furstenberg, *Is Teenage Sexual Behavior Rational?*, 21 J. APP. SOC. PSYCHOL. 957 (1991).

223. Ron S. Gold, *On the Need to Mind the Gap: On-Line Versus Off-Line Cognitions Underlying Sexual Risk-Taking*, in THE THEORY OF REASONED ACTION: ITS APPLICATION TO AIDS PREVENTIVE BEHAVIOR 227 (Deborah J. Terry et al. eds., 1993).

224. Eliot L. Gardner & Joyce H. Lowinson, *Drug Craving and Positive/Negative Hedonic Brain Substrates Activated by Addicting Drugs*, 5 SEMINARS IN THE NEUROSCIENCES 359 (1993).

225. See Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1483 (2005) (discussing smoking license proposal by Jay Bhattacharya and Darius Lakdawalla); cf. Jonathan Gruber & Botond Köszegi, *Is Addiction “Rational”? Theory and Evidence*, 116 Q. J. ECON. 1261 (2001) (developing optimal “sin tax” for smoking); Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AM. ECON. REV. 186 (2003) (discussing paternalistic policies in context of smoking).

226. Camerer et al., *supra* note 9, at 1245 (noting the possibility of requiring a suicidal person to give one month's notice of his intent).

227. *Id.* at 1245. Examples might be waiting periods before marriage or divorce. See Kronman, *supra* note 18, at 796 (arguing for longer waiting periods before allowing divorce, in order to increase nonemotional decisionmaking); Scott, *supra* note 124, at 48 (suggesting that waiting periods would increase the likelihood of reconciliation). See *infra* Part IV.B.3. (discussing cooling-off periods).

open about the paternalistic nature of their suggestion are Professors Ayres and Baker, who recently called for establishing a new crime of “reckless sexual conduct”²²⁸:

Appreciating that men and women may underestimate the true risks of unprotected first-time sexual encounters strengthens the rationales for government intervention. Thus, our crime can be justified now not only by the traditional “externalities” argument—men and women don’t take into account the harms to other people when they engage in reckless sex—but also as a form of cognitive “paternalism” aimed at increasing the perceived risk of engaging in unprotected first-time sexual encounters.²²⁹

Similar to Professors Sunstein and Scott, however,²³⁰ they frame their reasoning in cognitive, rather than emotional terms.

(c) *Manipulation by Others*

Private parties—firms, marketers, individuals—as well as governmental actors may seek to capitalize on any of the above naturally occurring emotional biases in order to further an agenda of moneymaking or power.²³¹ An important difference between the negative consequences resulting from naturally occurring biases and those from biases taken advantage of by others, private or public, may be the public’s receptivity to the paternalistic policy that might be proposed as a result. Voters are likely more receptive to policies designed to protect themselves from manipulated decisions than to policies perceived as more directly infringing on their own autonomous decisionmaking.²³²

228. Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 649-50 (2005). A person would be guilty of such crime if, in a first-time encounter with another person, he or she had sexual intercourse without using a condom. Although Ayres and Baker use gender neutral language in the definition, they suggest that the likely disparate effect on men is justified, *id.* at 644-46, partly on paternalistic grounds, *id.* at 646.

229. *Id.* at 649.

230. See *supra* note 86 (commenting on Sunstein’s cognitivism); *supra* note 124 (commenting on Scott’s cognitivism).

231. See Glaeser, *supra* note 9, at 155-56.

232. Compare Shapiro, *supra* note 16, at 530 (noting public reaction in Massachusetts to mandatory seat belt laws—unwillingness to accept the proposed intervention “as a matter of principle”—due to perceived paternalistic nature of the law), with Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS 207, 214 (2003) (“A recent public opinion poll suggests that Americans are divided in their views about the role of government in combating obesity: 48 percent feel that obesity is ‘a private issue that people need to deal with on their own,’ while 47 percent feel that it is ‘a public health issue that society needs to help solve.’” (footnote omitted)). Professor Glaeser documents the decrease in smoking from 1964 to 2004, in part due to soft paternalistic action by the government. Glaeser, *supra* note 9, at 153-54. He also notes that “beliefs about the harmfulness of cigarettes have changed over time,” *id.* at 154, as have perceptions of cigarette companies’ manipulation, fraud, and deception, Mello et al., *supra*, at 211-12. Together, such changing perceptions have led to acceptance of

i) *Securities Litigation*

One commentator has recently suggested protecting investors by revising the defenses afforded to those involved in securities litigation, in particular the defense of “puffery” and the “total mix” and “bespeaks caution” doctrines, to better reflect investors’ actual decisionmaking.²³³ Specifically, Professor Huang suggests that courts consider not only the *cognitive* impact that prospectuses or other informational material might have on potential investors and on shareholders, but also the *emotional* impact.²³⁴ He notes that the positive mood induced by “puffery” can lead to more superficial processing of a prospectus containing such puffery²³⁵ and recommends that that mood be considered when evaluating how a “reasonable” reader might interpret that material.²³⁶ Similarly, he suggests modifying the current “total mix” doctrine of evaluating the materiality of information presented in investment material to include evaluation of the total affect induced by that information.²³⁷ Taking such steps to protect investors against their own emotional tendencies is one example of emotion data leading to paternalistic steps.

ii) *Decisionmaking About Abortion*

Another instance of the potential for manipulation by others involves the influence of emotion on a woman’s decisionmaking about abortion. Because an abortion decision is so personal, often religious, and (as a broad public issue) receives such publicity, it is of course a highly emotional issue. But two other aspects of the decision, closely related to each other, involve emotional influence that might lead to paternalistic steps—albeit in different directions.

First, some research, though controversial, suggests that a small percentage of women who elect an abortion later experience regret and consequent poor mental health.²³⁸ Moreover, some groups of women are more susceptible to such negative sequelae than others: those who pursue abortion for reasons of birth defects in the fetus;²³⁹

harder legislative paternalism and increased liability for such companies. See Glaeser, *supra* note 9, at 154; see also, Mello et al., *supra*, at 212.

233. Huang, *supra* note 149, at 111-22.

234. *Id.* at 115.

235. *See id.* at 118.

236. *See id.* at 121.

237. *See id.* at 122.

238. See Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194, 1198-1200 (1992) (discussing the relatively benign effects that abortion-electing women generally face, but also discussing factors that can lead to negative effects).

239. J. R. Ashton, *The Psychosocial Outcome of Induced Abortion*, 87 BRIT. J. OBSTETRICS & GYNAECOLOGY 1115 (1980); Bruce D. Blumberg et al., *Psychological Sequelae of Abortions Performed for a Genetic Indication*, 122 AM. J. OBSTETRICS & GYNECOLOGY

younger women, as well as unmarried women without children;²⁴⁰ women who lack social support;²⁴¹ and women who had previously suffered some sort of emotional disturbance or psychological dysfunction.²⁴² In some instances, these populations are in fact the ones more likely to pursue abortions.²⁴³ Thus, although it is clear that most women experience predominantly positive emotional responses after abortion,²⁴⁴ a bias based on affective forecasting may afford the state a justification for providing information about such negative sequelae. That is, although individuals are usually correct about the valence of future emotional reactions, predictions of intensity and duration are usually inaccurate.²⁴⁵ Assume a state does want to discourage women from having abortions. Relying on the affective forecasting literature, the state might seek to document a tendency for women to underestimate the negative reaction they would have to having chosen an abortion and, accordingly, argue that it is proper to intervene to protect a woman who might be unduly optimistic. Thus, state legislative paternalism might be involved here in trying to ensure that a woman has all the information necessary to make an informed decision—that is, protecting her from an emotional, putatively ill-informed decision. As much information as possible should be given, the argument runs, to inform the woman of future potential consequences, including future emotional consequences, to her.²⁴⁶

799 (1975); C.M. Friedman et al., *The Decision-making Process and the Outcome of Therapeutic Abortion*, 131 AM. J. PSYCHIATRY 1332 (1974).

240. Adler et al., *supra* note 238, at 1200. (“Younger and unmarried women without children are relatively more likely than those who are older and who have already given birth to experience negative responses.”).

241. *See id.* at 1201 (reviewing studies, but also suggesting that the link between social support and postabortion emotions may be less clear than thought); *see also* Jeanette Martucci, *Meta-Analysis: Psychosocial Predictors of Psychological Sequelae of Induced Abortion* 57 (1998) (discussing the lack of perceived social support associated with poorer psychological adjustment) (unpublished dissertation, Miami Institute of Psychology of the Caribbean Center for the Advanced Studies) (on file with author).

242. Nancy Felipe Russo, *Psychological Aspects of Unwanted Pregnancy and Its Resolution*, in *ABORTION, MEDICINE, AND THE LAW* 593, 615 (J. Douglas Butler & David F. Walbert eds., 4th. ed. 1992) (noting that “history of emotional disturbance” is a “risk facto[r] for negative emotional responses after abortion”).

243. *See, e.g.*, Adler et al., *supra* note 238, at 1196 (noting that far more unmarried women are abortion patients than married women, and that abortion patients tend to be younger, most commonly 20-24 years old); *see also* PHYSICIANS FOR REPROD. CHOICE AND HEALTH & THE GUTTMACHER INST., *AN OVERVIEW OF ABORTION IN THE UNITED STATES* 24-25 (2006), http://www.guttmacher.org/presentations/abort_slides.pdf (showing that women age 20-24 have the highest abortion rates, and that approximately 67% were never married).

244. Adler et al., *supra* note 238, at 1198, 1202; *see also* Martucci, *supra* note 241, at 58-59 (reporting lower depression and anxiety in women who had abortions relative to control groups).

245. Blumenthal, *Affective Forecasting*, *supra* note 4, at 166-67.

246. *See, e.g.*, Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decision-making Process*, 4 WM. & MARY BILL RTS. J. 787, 813-15 (1996) (providing argument of hypothetical State Attorney General as to justifications for mandating such information).

And such an approach is constitutional under existing doctrine. Under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a statute requiring informed consent does not qualify as an “undue burden” on a woman seeking an abortion if the information is “truthful and not misleading.”²⁴⁷ This approach reshaped abortion jurisprudence, allowing states opposed to abortion to mandate various informed consent procedures under the guise of championing a woman’s decisionmaking autonomy.²⁴⁸

But this leads to the second paternalism point, focusing on judicial rather than legislative paternalism: although the information provided by the state under the guise of providing full and complete information may be truthful, it may nevertheless still be misleading under an approach similar to Professor Huang’s.²⁴⁹ Specifically, individuals hearing emotionally-laden communications eliciting fear or anxiety may be more susceptible to persuasion by that message.²⁵⁰

State-provided information that focuses on explicit descriptions of a developing fetus and/or the abortion procedure, or mandatory photographs or videos, may thus induce anxiety or fear to such a point that decisionmaking is affected and a woman might come to a decision different from that which she might under a less emotional judgment process. In such an instance, judicial intervention might be appropriate in evaluating, on a case-by-case basis, whether the information provided may have burdened the woman’s decisionmaking to such an extent as to render it unconstitutional.²⁵¹

iii) *Susceptibility to Advertising*

There is little question that marketers are aware of, and make use of, emotional influences on consumer behavior.²⁵² From pleasant

247. 505 U.S. 833, 882 (1992).

248. See Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22; see also Stenberg v. Carhart, 530 U.S. 914, 961 (2000).

249. See Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22.

250. See *id.*; Sunstein, *supra* note 86, at 771 (“when people are anxious and fearful, they are less likely to engage in systematic processing” and thus may be more easily persuaded); Sunstein, *supra* note 103, at 1565 (discussing the same); see also Richard E. Petty et al., *Multiple Roles for Affect in Persuasion*, in *EMOTION AND SOCIAL JUDGMENTS*, *supra* note 5, at 181, 183 (“[T]he most notable instances in which negative moods have produced more favorable attitudes reside in the vast literature on fear appeals.”); Kim Witte, *Putting the Fear Back into Fear Appeals: The Extended Parallel Process Model*, 59 COMM. MONOGRAPHS 329 (1992).

251. This argument, including a critique of the former suggestion, is developed more fully in Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22; cf. Glaeser, *supra* note 9, at 135 (stating that “[g]overnments have a strong incentive to abuse any persuasion-related infrastructure”).

252. A full discussion of such machinations would move far beyond this paper’s scope. For analysis, see, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 732-33 (1999) [hereinafter Hanson & Kysar, *The Problem of Market Manipulation*] (noting use by marketers of

aromas to sexy models to manipulative music, marketers seek to induce particular affective states in consumers. Their goal is to take advantage of individuals' tendencies to process more superficially and engage in "splurchases" (spontaneous purchases) when in a positive mood,²⁵³ and to avoid such spontaneity and process more deeply when in a negative mood.²⁵⁴ Similarly, marketers seek to capitalize on risk- or thrill-seeking consumers' emotional reactions to fast cars and dangerous or "extreme" sports,²⁵⁵ as well as naturally-occurring or marketer-created fears of physical or financial consequences.²⁵⁶

Those seeking to address such manipulation have suggested both prospective and retrospective efforts. Hanson and Kysar, for instance, developed an extensive discussion of liability regimes that might be imposed on market manipulators.²⁵⁷ Moreover, substantial efforts have been made in a variety of contexts to educate consumers about the effects of marketing ploys and both positive and negative emotional appeals. As discussed more fully below, however, such

positive affect to influence and manipulate consumers' perceptions); Hanson & Kysar, *supra* note 140 *passim*; Rachlinski, *Cognitive Errors*, *supra* note 9, at 228 (suggesting that "spammers generally make offers that deliberately take advantage of people's weaknesses and fears"); Neal J. Roese, *Counterfactual Thinking and Marketing: Introduction to the Special Issue*, 17 PSYCHOL. & MARKETING 277, 279 (2000) ("The manipulation of consumer emotions by marketers has long been a staple of successful advertising."); Eva Walther & Sofia Grigoriadis, *Why Sad People Like Shoes Better: The Influence of Mood on the Evaluative Conditioning of Consumer Attitudes*, 21 PSYCHOL. & MARKETING 755 *passim* (2004); Scot Silvergate, Comment, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. MIAMI L. REV. 1243, 1262 (1990) ("Clever advertising executives appeal to a consumer's emotional or psychological needs . . ."); Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2848 (2005) ("The external design of products often acts seductively on a consumer by tugging at his emotions (and with any luck, his wallet).").

253. See Hanson & Kysar, *supra* note 140, at 1444-46; Sarah C. Haan, Note, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1299-1300 (2000) (noting impact of positive affect and its relation to superficial processing).

254. See, e.g., Sharon E. Beatty & M. Elizabeth Ferrell, *Impulse Buying: Modeling its Precursors*, 74 J. RETAILING 169 (1998) (noting that a negative mood seems to alleviate the tendency to act on purchasing urges); Kordelia Spies et al., *Store Atmosphere, Mood and Purchasing Behavior*, 14 INT'L J. RES. IN MARKETING 1, 11 tbl.7 (1997) (showing that shoppers experiencing a negative mood change spent less on spontaneous purchases than those in positive mood); Patrick Van Kenhove & Patrick Desrumaux, *The Relationship Between Emotional States and Approach or Avoidance Responses in a Retail Environment*, 7 INT'L REV. RETAIL, DISTRIBUTION & CONSUMER RES. 351, 362-63 (1997) (consumers in negative mood engaged in more avoidance than those in positive mood).

255. See, e.g., Hanson & Kysar, *supra* note 140, at 1461-62.

256. See, e.g., *id.* at 1462-66 (giving examples of advertising campaigns either capitalizing on or explicitly manipulating consumers' fears); cf. Rachlinski, *Cognitive Errors*, *supra* note 9, at 223 ("Advertising and marketing strategies that concern risky behavior (including financial decisions) commonly are directed carefully at specific demographic segments.").

257. See generally Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 252; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000); Hanson & Kysar, *supra* note 140.

educational efforts are typically unsuccessful, and at times can be counterproductive.²⁵⁸

iv) Contract Terms

As sketched above, Professors Korobkin and Marrow have each discussed potential judicially paternalistic steps that might be taken in the context of manipulative, and thus arguably unconscionable, conduct in developing contract terms.²⁵⁹ Both reflect, to some extent, the discussion in Part III.C.2.c.ii., above, of state manipulation of the abortion decisionmaking process. Professor Korobkin's discussion focused more on cognitive limitations of bounded rationality, indicating the possibility for potentially positive paternalistic policies.²⁶⁰ Professor Marrow's discussion takes a similar approach, focusing more on emotional factors and reflecting Hanson and Kysar's suggestions of imposing liability.²⁶¹ For instance, he highlights the manipulation in one-sided liquidated damages clauses in contracts for the provision of emergency services, emphasizing the "experiential" or affective and emotional influences that tend to "impede sound [rational] reasoning."²⁶² As a result of the potential for such manipulation, he encourages courts to expand unconscionability doctrine by developing the tort of Consequential Procedural Unconscionability,²⁶³ which could include efforts by a seller or provider who takes deliberate advantage of known emotional biases to manipulate a potential buyer.

Although this tort has not taken hold doctrinally, courts sometimes do explicitly take into account the potential for emotional biases in evaluating the viability of contracts and contractual terms. That is, in some circumstances judges may be more willing to step in and overturn otherwise valid contracts. The clearest example involves courts' evaluation of contracts for a surrogate mother's services. Following the New Jersey Supreme Court's decision in *In re Baby M*,²⁶⁴ emphasis is often placed on whether a contract allows the surrogate mother to reverse her decision to relinquish the baby upon birth.²⁶⁵ Whether the contract acknowledges the possibility that a surrogate mother might change her mind based on the unpredicted

258. See *infra* Part IV.B.; cf. Hanson & Kysar, *supra* note 140, at 1447 ("Of course, knowing of such [marketing] techniques does not necessarily render one immune to their effects.").

259. See Korobkin, *supra* note 9 and accompanying text; see also Marrow, *supra* note 43 and accompanying text.

260. See Korobkin, *supra* note 9 and accompanying text.

261. See Marrow, *supra* note 43.

262. *Id.* at 49 n.68.

263. *Id.* at 38 (identifying the tort of Consequential Procedural Unconscionability and defining its elements).

264. 537 A.2d 1227 (N.J. 1988).

265. See Blumenthal, *Affective Forecasting*, *supra* note 4, at 209-14.

emotions involved with pregnancy and childbirth thus plays an important role in determining that contract's enforceability.²⁶⁶ This is not to say that manipulation is necessarily involved, but it does reveal courts' willingness to step in *ex post* to address a party's changed preferences.²⁶⁷

IV. EVALUATING INTERVENTIONS

A. Questions

The previous Part identified a number of emotional biases discussed in the social science literature that might detrimentally affect individuals' decisionmaking, and the potential need each bias raises for some sort of intervention to reduce or eliminate it. I turn now to empirical literature describing efforts to correct some of these biases, mentioning possible governmental interventions that might reflect such efforts. I discuss ways in which the biases above may play out in real-life, law- and policy-based contexts.

A crucial question, of course, is an intervention's potential effectiveness or success, especially in evaluating the costs involved.²⁶⁸ Thus, as I have suggested throughout, we must determine whether any of these emotional biases can in fact be corrected; if so, can we quantify, or at least roughly assess, the difficulty or costs of doing so? Two discussions become important in this context. First, what sort of interventions might be appropriate? Based on previous research, there are a number of different possibilities of how to correct a bias,²⁶⁹ and I sketched some suggestions in the discussion above. Below, I collate these into four categories: (1) self-correction by an individual; (2) education about particular biases or the circumstances leading to susceptibility to them; (3) procedural interventions such as cooling-off periods; and (4) substantive interventions, in which a decision is taken away from an individual either by substituting a third party's decision for his own, or by taking the decision away from him in the first place. *Ex post* judicial paternalism, where a court acts

266. *In re Baby M.*, 537 A.2d at 1248 ("Under the contract, the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed . . .").

267. Professor Hillman has pointed this out in another context as well. See Hillman, *supra* note 123.

268. BEHAVIORAL LAW AND ECONOMICS, *supra* note 3, at 9-10 ("A very large question involves the extent to which education can counteract cognitive and motivational distortions, so as to eliminate some of the effects described above. . . . Is it possible for those involved in law to 'debias' people . . . ? What institutions work best at reducing the effects of biases?"); see, e.g., Camerer et al., *supra* note 9, at 1219; Rachlinski, *Uncertain Psychological Case*, *supra* note 9, at 1219.

269. Camerer et al., *supra* note 9, at 1244-47 (outlining different types of paternalistic intervention); see also Sunstein & Thaler, *supra* note 9, at 1188-90.

retrospectively to relieve an individual of unanticipated consequences of a particular decision or decisionmaking process, might also be seen as a substantive intervention, even though this sort of substantive decision substitution would be at the individual's best.²⁷⁰

Second, it is important to compare the effectiveness of correcting *cognitive* biases with any data on the effectiveness of correcting *emotional* biases. Again, to date most legal and empirical analysis has been in the context of cognitive biases, with little attention paid to emotional ones. Further, little attention has been paid to the effectiveness of potential corrective techniques. Indeed, even scholars conducting empirical research on decisionmaking recognize the importance of further research on correcting emotional biases.²⁷¹ I address such effectiveness below, discussing different attempts to remedy both cognitive and affective biases, and address whether such biases might be differentially correctable.

B. Effectiveness of Debiasing

The first two potential means of debiasing are closely related, and involve somewhat less intrusive levels of intervention: self-correction and education.

1. Debiasing Through Self-Correction

First, we might have a deliberate effort by the actor to correct biases. At first glance, this may be thought to occur with decisionmaking involving higher stakes than ordinary social judgments, either because the higher stakes prompt more careful decisionmaking or because those stakes increase the likelihood of recourse to other, more reliable sources.²⁷² Unfortunately, however, neither appears to be the case. Financial incentives, for instance, are only unreliably successful in ameliorating biases,²⁷³ and it is unclear whether the

270. See *infra* note 356.

271. Richard P. Larrick, *Debiasing*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 4, at 316, 334 ("Identifying debiasing techniques for affect-based biases is a promising new area.").

272. See, e.g., Glaeser, *supra* note 9, at 140 ("Outside of the lab, people have access to advisers, books, the Internet, and more time. Their willingness to spend time and money to use these resources will surely depend on the stakes involved in the decision.").

273. See, e.g., Colin F. Camerer & Robin M. Hogarth, *The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework*, 19 J. RISK & UNCERTAINTY 7 (1999) (finding mixed results of influence of incentives on judgment and decisionmaking tasks in 74 empirical studies); Ralph Hertwig et al., *Judgments of Risk Frequencies: Tests of Possible Cognitive Mechanisms*, 31 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 621 (2005) (noting financial incentives' failure to influence judgment accuracy); Larrick, *supra* note 271, at 321 (observing that there is "little empirical evidence [that] incentives consistently improve mean decision performance" (citation omitted)). But see Bruno S. Frey & Reiner Eichenberger, *Economic Incentives Trans-*

judgment involved in recognizing when to seek recourse is not also influenced by bounded rationality and other cognitive and, perhaps, emotional limitations.²⁷⁴

Further, in order for self-correction to have a chance to succeed, the individual must be aware of the bias and must be motivated to correct it.²⁷⁵ There is some evidence that when awareness and motivation are both present, cognitive biases can be attenuated.²⁷⁶ But people typically assume that they are unbiased.²⁷⁷ Moreover, it is unclear whether this awareness-and-motivation mechanism is successful for emotional biases.²⁷⁸ For instance, self-control problems that lead to procrastination may not be overcome even by motivated individuals who recognize their difficulty. People do realize that they impulsively procrastinate, and even self-impose costly deadlines to try to overcome such tendencies.²⁷⁹ Nevertheless, they are unlikely to set those deadlines effectively and optimally; outsiders can set deadlines that are more effective.²⁸⁰ Other research shows that individuals who were intrinsically motivated to make accurate evaluations of a target person tried to compensate for irrelevant affective influence on their judgment, but in fact tended to *overcompensate*.²⁸¹ Additional studies

form *Psychological Anomalies*, 23 J. ECON. BEHAV. & ORG. 215, 225 (1994) (suggesting that individuals act more rationally with increasing incentives, though biases are not always eliminated).

274. Cf. Sunstein & Ullmann-Margalit, *supra* note 59 (because of bounded rationality, “people may choose second-order strategies that badly disserve their own goals, even when the stakes are high” (citation omitted)).

275. Wegner & Bargh, *supra* note 117, at 472 (“[I]f the person is not aware that [something] is influencing his or her judgment, no control is possible.” (citation omitted)); *id.* at 484 (“motivational impetus” is necessary to control biased decisionmaking).

276. *Id.*; see also Duane T. Wegener et al., *Not All Stereotyping is Created Equal: Differential Consequences of Thoughtful Versus Nonthoughtful Stereotyping*, 90 J. PERSONALITY & SOC. PSYCHOL. 42, 43 (2006) (“[U]se of stereotypes is decreased when motivation to think about individuating information is relatively high, as when people expect to be held accountable for their ratings of targets.” (citation omitted)); Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES*, *supra* note 3, at 185, 186-87 (noting elements necessary for correcting bias or “mental contamination,” including awareness of the bias and motivation and capacity to correct it).

277. Wilson et al., *supra* note 276, at 190 (“[P]eople’s default response is to assume that their judgments are uncontaminated.”).

278. See Cathy McFarland et al., *Mood Acknowledgment and Correction for the Mood-Congruency Bias in Social Judgment*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 483, 484 (2003) (noting that “there has been relatively little research examining the circumstances that prompt such mood correction”).

279. Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219, 224 (2002) (demonstrating that “people strategically try to curb [procrastination] by using costly self-imposed deadlines, and that self-imposed deadlines are not always as effective as some external deadlines in boosting task performance”).

280. *Id.*

281. See, e.g., Leonard Berkowitz et al., *On the Correction of Feeling-Induced Judgmental Biases*, in *FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL JUDGMENTS*, *supra* note 5, at 131; Linda M. Isbell & Robert S. Wyer, Jr., *Correcting for Mood-Induced Bias*

demonstrate this risk of overcorrection—a risk discussed more fully below—showing that although some motivated attention to one's mood can decrease affective biases, it is also possible that individuals “‘go overboard’ in their correction efforts,”²⁸² and make emotionally-biased judgments in the other direction despite their awareness and motivation, and despite their increased efforts to think about the particular decision target.²⁸³ Finally, individual differences tend to play a role in whether attention to mood can decrease its biasing effects on judgment, sometimes in detrimental ways. Specifically, for individuals who naturally tend to monitor their mood states, motivated processing can cause those in a good mood to make more accurate judgments than unmotivated processing.²⁸⁴ However, recall that those in a negative mood tend to make less superficial judgments.²⁸⁵ Motivated processing, therefore, might reduce the mood effects for such self-monitors. But because it was, in part, those effects that lead to increased accuracy, the reduction came at the cost of judgment accuracy for those in a negative mood.

When motivated processing involves the active suppression of attitudes, cognitions, or emotions, there are other serious costs as well. Suppression of emotional responses, as well as similar efforts to self-regulate, leads to what psychologist Roy Baumeister has called “ego-depletion”—a decrease in postsuppression capacity to engage in similar self-control: “Acts of self-control, responsible decision making, and active choice seem to interfere with other such acts that follow soon after.”²⁸⁶ This decreased ability to self-regulate also follows efforts to suppress stereotype use.²⁸⁷ Essentially, what Baumeister and col-

in the Evaluation of Political Candidates: The Roles of Intrinsic and Extrinsic Motivation, 25 PERSONALITY & SOC. PSYCHOL. BULL. 237 (1999).

282. McFarland et al., *supra* note 278, at 489 (citing David DeSteno et al., *supra* note 149, and Victor C. Ottati & Linda M. Isbell, *Effects of Mood During Exposure to Target Information on Subsequently Reported Judgments: An On-Line Model of Misattribution and Correction*, 71 J. PERSONALITY & SOC. PSYCHOL. 39 (1996)).

283. Wegener et al., *supra* note 276, at 50 (noting that effortful thought may not only lead to decreased use of stereotypes but may also create stereotypes more stable and resistant to change).

284. Joseph P. Forgas et al., *Mood Effects on Eyewitness Memory: Affective Influences on Susceptibility to Misinformation*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 574, 584 (2005) (demonstrating that explicit instructions to suppress affect worked only for individuals described as high self monitors and socially desirable).

285. See sources cited *supra* note 5.

286. Roy F. Baumeister et al., *Ego Depletion: Is the Active Self A Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252, 1263-64 (1998); see also Mark Muraven et al., *Self-Control as Limited Resource: Regulatory Depletion Patterns*, 74 J. PERSONALITY & SOC. PSYCHOL. 774 (1998); Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. BULL. 247 (2000).

287. Jennifer A. Richeson & J. Nicole Shelton, *When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function*, 14 PSYCHOL. SCI. 287, 290 (2003); Jennifer A.

leagues document is the tendency for active self-regulation to have unintended consequences after that regulation ends. Although self-regulation may be successful in reducing biased decisionmaking, additional costs accrue that influence subsequent behavior and decisions—as in the overcorrection example above, but in different decisionmaking contexts. Depending on how serious that postregulation behavior or decisionmaking is, therefore, the costs of such self-control may outweigh its benefits. Accordingly (and unfortunately), these researchers suggest, “these results point to a potentially serious constraint on the human capacity for control (including self-control) and deliberate decision making,”²⁸⁸ a constraint with important implications for paternalistic policies.²⁸⁹

A final concern for such motivated self-correction as a paternalistic intervention is semantic: under our initial definition, it is simply difficult to conceptualize this phenomenon as paternalism. That is, intrinsically motivated self-correction does not really involve much actual third-party intrusion. When such self-correction is motivated by another individual or by other extrinsic motivation, it more closely approaches “paternalism” as such. From this perspective, it elides easily into the second category of intervention, educating or informing people of biases.²⁹⁰

2. *Debiasing Through Education*

Indeed, taking either an informed consumer or a classical rational decisionmaker perspective, providing information and education is often seen as an ameliorative measure for overcoming shortcomings or biases in decisionmaking.²⁹¹ Simply providing an individual with accurate information—regardless of its emotional valence—is seen as facilitating autonomous decisionmaking, as in the abortion context discussed above.²⁹² Similarly, providing disclosure about a product—regardless of *its* emotional valence or of its likely effect on a recipient—is seen as a viable means of avoiding liability for the recipient’s

Richeson & Sophie Trawalter, *Why Do Interracial Interactions Impair Executive Function? A Resource Depletion Account*, 88 J. PERSONALITY & SOC. PSYCHOL. 934, 944 (2005).

288. Baumeister et al., *supra* note 286, at 1264.

289. Individual differences may play a role in these effects. One recent study found that suppression does lead to ego depletion and does lead to increased subsequent stereotyping, but only for individuals less likely to use stereotypes in the first place. Ernestine H. Gordijn et al., *Consequences of Stereotype Suppression and Internal Suppression Motivation: A Self-Regulation Approach*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 212 (2004). Thus, the good news of such research is the possibility that such ego depletion may not occur as a result of suppression—less promising is that that news only applies to those for whom correction would be less likely.

290. *Cf.* Frey et al., *supra* note 273, at 224 (suggesting that formal education assists individuals in recognizing decisionmaking biases).

291. *See supra* note 186 and accompanying text.

292. Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22.

choice about that product, as in the securities or credit card context.²⁹³

Unfortunately, however, this approach is not much more effective than the last.²⁹⁴ In the cognitive context, for instance, one of the more difficult biases to correct is the hindsight bias. Simply informing an individual about the bias is usually unsuccessful;²⁹⁵ more aggressive tactics are often required in order to be successful.²⁹⁶ Other biases, such as the self-serving bias, can sometimes be corrected through identifying counterarguments and asking a decisionmaker to list weaknesses in his own position: “In the literature on debiasing, one type of intervention stands out as effective against a wide range of biases. This involves having subjects question their own judgment by explicitly considering counterarguments to their own thinking.”²⁹⁷

293. See Camerer et al., *supra* note 9, at 1236-37 (discussing similar legislation in the context of pensions, responding to the Enron failure: “a bill designed to induce 401(k) portfolio diversification by employees by requiring plan sponsors to ‘advise participants and beneficiaries of the importance of diversifying the investment of the assets in their accounts and of the risk of holding in their portfolios securities of any one entity, including employer securities’ ”); Chris Guthrie, *Law, Information, and Choice: Capitalizing on Heuristic Habits of Thought*, in *HEURISTICS AND THE LAW* 425 (G. Gigerenzer & C. Engel eds., 2006) (discussing disclosure assumptions); Richard L. Wiener et al., *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 475 (2005) (In the context of the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: “[l]awmakers presume that enhanced credit card disclosure would help debtors to avoid incurring credit card balances beyond their ability to repay and enable them to better assess and compare credit card offers. Disclosure is also thought to deter predatory lending practices by providing consumers with needed information”); see also *supra* notes 233-37 and accompanying text (discussing the securities context).

294. See, e.g., Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for its Future*, 51 DUKE L.J. 1397, 1490-91 (2002) (noting and collecting citations showing that many cognitive biases relevant to investing are not “easily remedied by information or education”); Wiener, *supra* note 293; see also *infra* notes 295-324 and accompanying text.

295. See, e.g., Baruch Fischhoff, *Perceived Informativeness of Facts*, 3 J. EXPERIMENTAL PSYCHOL. HUM. PERCEPTION & PERFORMANCE 349, 356-57 (1977).

296. Rachlinski, *supra* note 125, at 603. For examples of difficulty with correcting the hindsight bias, see Lawrence J. Sanna & Norbert Schwarz, *Debiasing the Hindsight Bias: The Role of Accessibility Experiences and (Mis)Attributions*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 287 (2003); Donald Sharpe & John G. Adair, *Reversibility of the Hindsight Bias: Manipulation of Experimental Demands*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 233 (1993) (Study 1). For some successful correction efforts, see *id.* (Study 2), using “never-knew-that” instructions, and Merrie Jo Stallard & Debra L. Worthington, *Reducing the Hindsight Bias Utilizing Attorney Closing Arguments*, 22 LAW & HUM. BEHAV. 671 (1998), reducing hindsight bias for jurors.

297. Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997); see, e.g., Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 SOC. COGNITION 126 (1982) (alternative explanations successful at debiasing); Adam D. Galinsky & Gordon B. Moskowitz, *Counterfactuals As Behavioral Primes: Priming the Simulation Heuristic and Consideration of Alternatives*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 384 (2000) (priming participants to think counterfactually decreased biases); Laura J. Kray & Adam D. Galinsky, *The Debiasing Effect of Counterfactual Mind-Sets: Increasing the Search for Discon-*

This is also an approach with using “deautomatization” to decrease the use of prejudicial stereotypes.²⁹⁸ Greg Mitchell recently summarized some of the relevant literature demonstrating that although it is difficult, cognitive biases can sometimes be corrected through education and instruction; his conclusion was that the potential for debiasing militates against Sunstein and Thaler’s claim that paternalism is inevitable.²⁹⁹

Another recommendation in the cognitive context has been for individuals simply to avoid the stimuli that might influence their decisions and judgments.³⁰⁰ Similarly, in the emotion context, some researchers have alluded to the possibility of educating decisionmakers about differences between calm- and emotion-state decisions, with the goal of helping them “avoid situations in which the dangerous temptation might occur.”³⁰¹ Indeed, in his discussion of law and emotions, Eric Posner has suggested that people do this naturally.³⁰²

There are difficulties with all of these approaches and inferences, however, that illustrate that they would likely be infeasible or unsuccessful in the emotional bias context. First, we can hardly avoid all emotion-eliciting stimuli. Second, contrary to Professor Posner’s suggestions, “we do not always know in advance whether information will bias our judgments; therefore, excessive exposure control will result in the failure to receive information that is diagnostic and useful.”³⁰³ Third, directly relevant to the cost-benefit analysis, people will have to be “extremely vigilant, ready to shut their eyes and cover their ears whenever they suspected that potentially unwanted information was in the vicinity: Is such vigilance worth the effort it entails?”³⁰⁴

Fourth, in terms of counterarguments, it is hard to try to imagine identifying some “weakness” in emotion per se. And as seen in the hot-cold empathy gap section, it is also difficult to imagine oneself in

firmatory Information in Group Decisions, 91 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 69 (2003) (showing that priming participants to think counterfactually decreased biases in subsequent tasks). *But see* Sanna & Schwarz, *supra* note 296 (thinking about alternative outcomes exacerbated hindsight bias).

298. *See, e.g.*, Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 953 (1999) (“[I]f a subject deliberately processes nonstereotypical information, she may be able to overcome automatic processes that create stereotypic responses.”).

299. *See* Mitchell, *supra* note 9, at 1277 n.40 (collecting studies concerning debiasing of cognitive biases).

300. Wilson et al., *supra* note 276, at 195 (suggesting this “exposure control” strategy).

301. Loewenstein & Schkade, *supra* note 150, at 100.

302. *See* Posner, *supra* note 4.

303. Wilson et al., *supra* note 276, at 195.

304. *Id.*

another state. That is, if an individual is in a positive mood, it is hard to imagine decisionmaking in a negative mood (and may be even harder vice versa); if he is in a sexually aroused state, it would be difficult to imagine the alternative.³⁰⁵ It is equally difficult to apply another means of reducing cognitive biases to the emotional context: one way of reducing the reliance on prejudicial stereotypes is *self-focus*, sometimes as easy as placing a mirror in the room with someone making an evaluation. This apparently helps to heighten awareness of discrepancy between consciously held beliefs, on the one hand, and unconscious stereotypes or negative responses, on the other.³⁰⁶ It is unclear, though, how this might be done with emotional biases, and emotion research does not suggest in detail how and why it might be successful. Thus, despite difficulties correcting cognitive biases through information and education, correcting emotional biases that way may be even harder.

Fifth, education as a debiasing mechanism is difficult and resource-intensive, especially in the emotional context. Moreover, it is often unsuccessful;³⁰⁷ for instance, efforts at paternalistic education regarding financial decisions is not especially effective.³⁰⁸ More

305. Ariely and Loewenstein recently suggested that this may also raise concerns in the context of criminal law and punishment:

[J]udges and jurors, who are generally unaroused when making decisions of guilt and punishment, may be excessively condemnatory and punitive toward sexual offenders because they make their decisions in a sexually unaroused state and fail to appreciate how intense sexual arousal would alter even their own decision making in potentially compromising circumstances. The result is that decisions will be stigmatized as immoral misbehavior even by people who would themselves make the same choice when in an aroused state. It should be clear that such effects of arousal cannot justify any sexual exploitation, but they can make such behaviors somewhat more understandable. From the perspective of the legal system it is possible that sexual arousal should be given more credit as a partially mitigating factor than it would normally receive.

Ariely & Loewenstein, *supra* note 220, at 96.

306. See John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 535-36 (1997); Ann C. McGinley, *!Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 425-32, 488 nn.376-82 (2000).

307. Hanson & Kysar report that:

As Tversky and Kahneman have argued, "[e]ffective learning takes place only under certain conditions: [I]t requires accurate and immediate feedback about the relation between situational conditions and the appropriate response." These requirements often are not met because: (i) outcomes are commonly delayed and not easily attributable to a particular action; (ii) variability in the environment degrades the reliability of the feedback . . . ; (iii) there is often no information about what the outcome would have been if another decision had been taken; and (iv) most important decisions are unique and therefore provide little opportunity for learning.

Hanson & Kysar, *The Problem of Market Manipulation*, *supra* note 252, at 691-92 (footnotes omitted) (citing Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 90-91 (Robin M. Hogarth & Melvin W. Reder eds., 1987)).

308. See, e.g., Hu, *supra* note 121, at 73.

broadly, people view information and messages in biased fashion, and thus are unlikely to consider the possibility that their judgments are biased.³⁰⁹ Similarly, people may simply not believe the informational message to which they are exposed; and/or they may focus on factors not captured by the message.³¹⁰ Professor Sunstein illustrates the difficulties of correcting perceptions biased by emotion in the context of risk regulation and probability neglect:

If government is attempting to decrease public concern with a risk that has a tiny probability of coming to fruition, it may be ineffective if it emphasizes the issue of probability; indeed, it may do better if it changes the subject or stresses instead the affirmative social values associated with running the risk. On the other hand, public fear, however unwarranted, may be intractable, in the sense that it may be impervious to efforts at reassurance. And if public fear is intractable, it will cause serious problems, partly because fear is itself extremely unpleasant and partly because fear is likely to influence conduct, possibly producing wasteful and excessive private precautions. If so, a governmental response, via regulatory safeguards, would appear to be justified if the benefits, in terms of fear reduction, justify the costs.³¹¹

Sunstein's point is:

not simply that people may well misunderstand risk disclosures, perceiving the hazard as far greater than it is in fact. The problem is that the disclosure may alarm people, causing various kinds of harms, without giving them any useful information at all. If people neglect probability, they may fix, or fixate, on the bad outcome in a way that will cause anxiety and distress, but without altering behavior or even improving understanding.³¹²

His concluding "lesson for policy: It might not be helpful to present people with a wide range of information, containing both more assuring and less assuring accounts."³¹³

Another example of unsuccessful debiasing is in the context of the endowment effect. Some researchers have applied the lessons of cog-

309. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) (showing that subjects who opposed capital punishment critiqued studies purporting to show that it is a deterrent more than studies showing it is not; studies favoring capital punishment did the opposite); Steven B. Most et al., *How Not to Be Seen: The Contribution of Similarity and Selective Ignoring to Sustained Inattentional Blindness*, 12 PSYCHOL. SCI. 9 (2001).

310. Paul Slovic, *Perception of Risk*, in THE PERCEPTION OF RISK 220 (2000).

311. Sunstein, *supra* note 7, at 69-70.

312. *Id.* at 91.

313. *Id.* at 82. There is also empirical evidence that emotionally-based attitudes are less influenced by cognitively-based persuasion than by that which is emotionally-based. See Kari Edwards, *The Interplay of Affect and Cognition in Attitude Formation and Change*, 59 J. PERSONALITY & SOC. PSYCHOL. 202 (1990).

nitive debiasing, looking at whether the EE could be ameliorated by perspective-taking.³¹⁴ Both cognitive and emotional biases prevent that, however. Cognitively, people overestimate the similarity between their own valuation of a good and the valuation by another.³¹⁵ Emotionally, this false prediction stems in part from people's biased emotional predictions of how much they would value the good if they were in the shoes of the other party, whether that party is owner or buyer.³¹⁶ That is, not only do people not predict that they will develop an increased liking from a commodity once it is owned, but people also take that increased valuation as an objective value and assume that a buyer would in fact value it approximately the same way (conversely, a potential buyer assumes that the seller values it approximately the same as she does). This leads to inefficiencies in the form of missed transactions.

Sixth, the awareness/motivation issues arise again. It is typically necessary that people be aware of their incidental or target-related mood in order to correct for it.³¹⁷ As noted above, drawing attention to potential emotional bias can sometimes ameliorate the bias. However, this is clearly enormously difficult for a third party to monitor and continue to educate about—even with encouragement, people likely do not conduct their everyday activities monitoring their affective states. Even if that were feasible, it is simply unclear whether such attention works similarly for positive and negative moods,³¹⁸ and such awareness is not consistently effective for all people in all situations.³¹⁹

Seventh, individuals tend to persevere with wrong thinking even when educated, and even recognizing that it is wrong. This is especially likely in the emotional bias context: again, recall Denes-Raj and Epstein's jellybean experiment, where subjects' emotional or experiential reasoning overcame their rational reasoning, even when they were explicitly instructed about, and clearly understood, the relevant probabilities.³²⁰ The perseverance of emotionally-comforting superstitious activities or rituals, even though one "knows" rationally that they do not affect an outcome, illustrates this as well.

Finally, as mentioned above, even when biases are recognized, and people are motivated to correct them, individuals actually tend

314. Van Boven et al., *supra* note 169.

315. *Id.* at 67.

316. *Id.*

317. McFarland et al., *supra* note 278, at 484.

318. *See supra* note 147.

319. *See* Joseph P. Forgas, *supra* note 195, at 596, 601 (noting exceptions).

320. *See supra* note 114.

to overcorrect for those biases.³²¹ That is, when someone realizes that an incidental emotion might bias her decision, she may try to correct for it. However, because she may not always accurately assess the intensity and duration of her emotions,³²² and because she may not accurately assess the degree of her emotional biases,³²³ she may overcorrect for the bias, leading to biased judgments in the opposite direction.³²⁴

3. *Debiasing Through Procedural Interventions*

A number of procedural steps might be taken to improve individuals' decisionmaking or to protect them from the consequences of their biased or faulty decisions. Sunstein and Thaler's default rules are a good example; as are the "cooling-off periods" that are often suggested and occasionally implemented, with the goal of giving consumers or others a chance to reconsider what might have been a hasty or emotionally-influenced decision.

The effect of choosing and changing default rules is thoroughly discussed in Sunstein and Thaler's work.³²⁵ Their focus, however, was on such rules' effects on cognitive biases; it is not yet clear whether the changes they proposed would be as effective for addressing the influence of emotion. Cooling-off periods, in contrast, are designed explicitly to counter the effect of emotional bias, by allowing the emotional state to dissipate and the decisionmaker (individual or institutional) to return to a cooler, calmer, more "rational" state.

As Camerer and others have noted, there are at least two different kinds of cooling-off periods.³²⁶ The first prevents a decisionmaker from making a decision or enacting a behavior until some amount of time has passed, presumably enough for the emotional state to dissipate.³²⁷ The second allows the decision to be made or the behavior to be enacted during the "hot" emotional state, but permits the actor to

321. See, e.g., Ehud Guttel, *Overcorrection*, 93 GEO. L.J. 241 (2004) (noting that the legal system sometimes corrects for overcorrection); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

322. Blumenthal, *Affective Forecasting*, *supra* note 4, at 166.

323. See, e.g., Van Boven et al., *supra* note 169.

324. Berkowitz et al., *supra* note 281; Isbell & Wyer, *supra* note 281 (documenting overcorrection for mood-induced biases). This is also relevant to one of Mitchell's suggestions in the context of debiasing. Reviewing the relative success of consider-the-alternative and opposing-argument techniques for correcting cognitive biases, he suggests that they "appear to have the salutary characteristic that, even if ineffective, make them unlikely to worsen the situation, though this is an empirical question that remains to be answered more definitively." Mitchell, *supra* note 137, at 135. It seems, though, that even such mechanisms have the potential to backfire. Cf. Wegner & Bargh, *supra* note 117, at 473-74 (noting potential for efforts to correct cognitive biases to backfire).

325. Sunstein & Thaler, *supra* note 9, at 1187.

326. Camerer et al., *supra* note 9, at 1240.

327. *Id.*

change her mind and revoke the decision, or possibly the consequences of the behavior.³²⁸

Although both sorts are discussed as corrective paternalistic steps, and although both have in fact been applied in certain circumstances, both have flaws that suggest caution in their implementation, though not necessarily the caution that Camerer and colleagues have suggested. For instance, Camerer and colleagues suggest that cooling-off periods are somewhat “intrusive,” and as such should “be implemented with . . . reticence and only after careful analysis.”³²⁹ They may be referring to the first sort of policy, involving mandatory waiting periods before a consumer may take possession of a purchase. The latter sort, however, allowing a buyer to change his mind within a certain time frame, does not seem terribly intrusive, especially to the extent that it simply mandates inaction, providing an opportunity to sit back and allow an emotional influence to dissipate.³³⁰

But difficulties exist nevertheless. The first type of cooling-off, simply waiting for an emotional state to die down, may not always be feasible. First, of course, either the actor or the intervenor must recognize the possibility of affective bias. As suggested above, actors are often simply unaware of the potential for such bias.³³¹ It is also difficult for third parties to anticipate the influence of emotion *unrelated* to a judgment task and to prescribe a corrective.³³² Second, relatedly, individuals must often make judgments or decisions about emotionally-laden events or risks.³³³ It is unclear that the emotion associated with such decisions might dissipate; to some extent, considering the decision will continually evoke some strong, potentially biasing emotion. The risk of terrorism, disease, or nuclear accidents are facile examples, but consider also the emotions the surrogate mother experiences upon giving birth. Presumably, the emotions associated with raising the child continue—even after the emotions associated

328. *Id.* A third sort is similar but places more of a burden on the decisionmaker by allowing a decision but requiring a subsequent confirmatory action in order to finalize the purchase, decision, or other choice. *See, e.g.,* Péter Cserne, How (Not) to Use Behavioral Economics in Justifying Paternalism: Methodological Issues and Some Applications in Contract Law (paper presented at the Behavioral and Experimental Law and Economics Conference, Haifa, Israel (June 2006)) (on file with author).

329. Camerer et al., *supra* note 9, at 1239.

330. Shapiro, *supra* note 16, at 531 n.42 (suggesting that “imposition of a brief waiting period[] may be considered nonpaternalist, or at most to be paternalism of an especially weak, nonintrusive character”). The confirmatory action sort that Cserne mentions, *supra* note 328, might be seen as more intrusive.

331. *See* Camerer et al., *supra* note 9, at 1252 (noting that “people are unlikely to be aware of their errors”).

332. It seems odd at best, for instance, to dictate that decisions requiring thorough analysis or processing may not be made on a sunny day, which elevates someone’s mood and potentially leads to superficial analysis.

333. *See supra* Part III.C.2.a.

with physically carrying the child end—and thus affect the decision to relinquish the child or not. Similarly, property owners subject to the endowment effect will likely not lose their glow of ownership; indeed, the effect demonstrates that that glow may only grow warmer.

As Camerer and colleagues recognize, the second type of cooling-off period, allowing or encouraging the reversibility of decisions, can also be moot: “it is impossible, for example, to undo unsafe sex or suicide.”³³⁴ But even where relevant, such cooling-off—like efforts to correct other biases—may simply be ineffective or even counterproductive. For instance, substantial research demonstrates that once a decision is made, individuals tend to feel committed to it and seek to rationalize the decision by focusing on the benefits or positive aspects of the outcome of the decision or the product chosen.³³⁵ Individuals may thus tend not to change their mind even when they have the option to.

Such a tendency might in fact reinforce the *perceived* benefits of cooling-off periods and of the opportunity for reversible decisions. And, at least in the abstract, people think they prefer such changeable outcomes. People behave as though reversible decisions are beneficial, and try to “pay premiums today for the opportunity to change their minds tomorrow.”³³⁶ However, cooling-off interventions that impose such opportunities may in fact be more problematic than assumed. As implied earlier in the discussion of “keeping doors open,”³³⁷ people are actually *less* satisfied with their choices when decisions are reversible, deriving less utility from their choice or from the outcome than if the decision had been unchangeable. Accordingly, if a cooling-off period is imposed paternalistically on consumers in order to allow an emotional state to disappear, but consumers know that the cooling-off period applies, then they may actually derive less utility from the good than if it had been an irreversible sale: “buyers who pay to have escape clauses in their contracts may paradoxically undermine, rather than advance, the cause of their own satisfaction.”³³⁸

4. *Debiasing Through Substantive Interventions*

The three relatively unintrusive mechanisms above might appeal to those who are concerned about nonoptimal decisionmaking, but who are nevertheless sensitive to autonomy or liberty concerns. Those less sensitive, or those persuaded by the empirical research

334. Camerer et al., *supra* note 9, at 1240.

335. Gilbert & Ebert, *supra* note 61.

336. *Id.* at 504.

337. Shin & Ariely, *supra* note 60, at 575.

338. Gilbert & Ebert, *supra* note 61, at 505.

reviewed earlier that such concerns must be held to a higher burden of persuasion, or those persuaded by the empirical research that such mechanisms are largely unsuccessful, might turn to more intrusive, substantive paternalistic intervention. From this perspective, at least two forms of governmental intervention might be appropriate: legislative (in which I include agency decisionmaking) and judicial. Both involve affirmatively substituting a third party's decision or judgment for an individual's, or involve constraining the individual's decisionmaking options to eliminate the possibility of nonoptimal choices.

(a) *Legislative Substitution*

The classic objection to such legislative (and even judicial) judgment substitution appeared earlier: people know their tastes and preferences and act rationally to achieve them, better than any third party might know or do. As sketched above, though, people do make poor decisions.³³⁹ That observation, however—which drives much of this literature in the first place—does not necessarily demonstrate that a third party such as the government could do better. The essential question is whether a third party's perception of “what is good for me” is sufficiently better than my perception (flawed as it may be) that it should act to replace or constrain my choices. The prevailing assumption, most famously expressed by John Stuart Mill, is that it is not:

[W]ith respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society to overrule his judgement and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.³⁴⁰

339. See *supra* notes 37-47 and accompanying text.

340. JOHN STUART MILL, *ON LIBERTY*, reprinted in J.S. MILL: *ON LIBERTY IN FOCUS* 21, 91 (John Gray & G.W. Smith eds., 1991). The sentiment is oft-repeated. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 412 n.32 (2002); Glaeser, *supra* note 9, at 143 (raising the question of “whether private or public decisionmakers are more likely to get things right when there are endogenous errors”); Kahneman, *supra* note 21, at 107 (“[T]he observed deficiencies [in consumer rationality] suggest the outline of a case in favor of some paternalistic interventions, when it is plausible that the state knows more about an individual's future tastes than the individual knows presently.”); *id.* at 116 (asking whether paternalistic actions are warranted where “an outsider can . . . predict an individual's future utility far better than the individual can”); Shapiro, *supra* note 16, at 546 (“[A]n individual is likely to have a better idea than anyone else of how a particular choice fits his circumstances and goals. It has never been shown that, as a general matter, *A* can

But in some instances, a third party may in fact make better choices and judgments regarding a particular individual's preferences than that individual might himself. Importantly, at least three of these contexts are ones in which emotional biases are present. First, supporting the Millian perspective, it seems correct as an empirical matter that third parties ordinarily overestimate the risk preferences of others.³⁴¹ However, recall that in the context of negative events, overoptimism tends to reduce individuals' perceptions of self-relevant risks;³⁴² in one sense, overestimation might in fact bring the third party's estimates closer to the truth. But recall that Hsee and Weber also showed that when the target of the prediction—that is, the person whose risk preferences are being estimated—is made salient, or “vivid,” the overestimation disappears.³⁴³ Personal interaction or actual familiarity with the person is not necessary; in Hsee and Weber's research, all that was necessary was visual observation.³⁴⁴ Thus, it may be that simply identifying the target individual to the third party may ameliorate overestimation by that third party, and may result in more accurate risk estimation than might simply leaving the decision to the potentially emotional individual.

Two clearer examples exist. Recall Professor Hsee's other research, demonstrating that when decisions are made about emotionally-laden tasks, individuals tend to ignore probabilities except at extremes.³⁴⁵ Failure to attend to the probability of an event actually occurring may easily lead to poor judgments on the individual's part; when these individuals join together and express these inaccurate judgments, decisionmaking about such events can be biased. When decisionmakers attend more to “calculation,” however—to objective factors—and less to emotional aspects of an event, their judgments and decisions are far more sensitive to the accurately identified relative probabilities.³⁴⁶ Where lay perceptions of risk are biased due to emotional factors, more accurate third-party judgments of those risks

do a better job of choosing for *B* than *B* can do for himself”); O'Donoghue & Rabin, *supra* note 225, at 186 (“Most adults in most situations make better choices for themselves than others would make for them. . . .”); Zamir, *supra* note 18, at 236 (noting that the fact that policymakers “lack intimate familiarity with the people to whom their rules apply . . . increases the probability that state paternalism will be ill-informed and counterproductive”). *But see id.* at 239 (suggesting, based on empirical observation of judgment and decision errors, that “Mill's objection is unsound”).

341. Hsee & Weber, *supra* note 216, at 52.

342. *See supra* note 42.

343. Hsee & Weber, *supra* note 216, at 52.

344. *Id.*

345. *See supra* notes 179-86 and accompanying text.

346. *Id.*

should be substituted.³⁴⁷ Relevant contexts might be perceptions of nuclear accidents, terrorism,³⁴⁸ or self-relevant risks such as smoking or other addictive behavior.

What of the possibility that the very decisionmakers being substituted may also be subject to the impact of the emotionally-laden judgment?³⁴⁹ Again, being one step removed from the decision target may ameliorate that effect, as may the increased likelihood of focusing on calculation. But some evidence also suggests that the act of group deliberation—though it does not necessarily ameliorate cognitive biases, and is subject to other risks such as group polarization and groupthink³⁵⁰—may in fact alleviate some emotional biases on judgment.³⁵¹ If so, then shifting decisions to deliberative groups, rather than to individuals and rather than to nondeliberative groups such as voters, might be useful in order to avoid emotional biases.³⁵²

Recall that many of the emotional biases reviewed above stemmed from the influence of concurrently experienced moods. A potential third-party intervenor, of course, is less likely to be under the influ-

347. Cf. Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 985 (2004) (suggesting, in a different context, that “[p]opularly perceived risk should not determine risk regulation”).

348. But see Guthrie, *supra* note 158 (suggesting that predictive errors put policy makers in an awkward position).

349. A common argument against shifting decisionmaking authority to legislators or agency members is that they are subject to the same biases that shift is seeking to prevent. E.g., Clayton P. Gillette & James E. Krier, *Risks, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1093-94 (1990) (“Experts, being human, are susceptible to the cognitive limitations that burden all of us, and this is one reason why instances of expert failure are so familiar to everyone. . . . [Thus,] expert competence nevertheless falls considerably short of the demands of the very comprehensive rationality that experts would strive to serve, and this matters in the choice of institutional arrangements.”).

350. See generally Jeremy A. Blumenthal, *Who Decides? Privileging Public Sentiment About Justice and the Substantive Law*, 72 UMKC L. REV. 1, 20 (2003) (noting potential for these effects in deliberating groups); cf. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 106-08 (2000) (discussing group polarization effects).

351. See Blumenthal, *Mood and Moral Judgment*, *supra* note 4, at 21-22 (reviewing such evidence).

352. Indeed, this is one characterization of multi-cameral government generally, and of provisions of the U.S. Constitution in particular—as an effort to “protect the people against itself.” Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1988 (2003) (quoting Jon Elster, *Intertemporal Choice and Political Thought*, in CHOICE OVER TIME 35, 40 (George Loewenstein & Jon Elster eds., 1992)). That is, such governance is seen as “a structural limitation on . . . the risk of ‘passion’ in democratic governance.” *Id.* at 1989. Both cooling-off and deliberative aspects of such governance suggest this characterization. See also Glaeser, *supra* note 9, at 156 (“Institutions like the Supreme Court and the Senate, which effectively create cooling-off periods that allow for debate that is not tied to a general election, may reduce errors of policy.”). Professor Sunstein has suggested that to the extent legislators are expressing the will of the electorate, such legislative action need not even be considered paternalism. Sunstein, *supra* note 49, at 1141 (arguing that the actions of a voting majority seeking to bind itself through legislative action need not be considered “paternalism”).

ence of the biasing mood in question. However, given that it is virtually impossible to predict what sort of incidental mood an individual might be subject to at the time of a particular decision task, substantive legislative paternalism in this sense may be tantamount to removing *all* decisions from individual decisionmakers; again, such a step seems disproportionate. Broadly speaking though, the justification for this sort of substantive legislative paternalism may be not that such decisionmakers necessarily know individuals better than they do themselves, or necessarily make better decisions and judgments.³⁵³ Rather, the justification may simply be that they are more likely to be free of particular emotional biases. Thus, one implication is to suggest cooling-off periods for judgments or decisions that are likely to be biased by immediate or incidental affect, and the use of experts or other substitute decisionmakers for judgments about or involving emotionally-laden events.³⁵⁴

(b) *Judicial Substitution*

As Klick and Mitchell have suggested, it is useful to distinguish between *ex ante* paternalism, of the sort outlined in the sections above, and *ex post* paternalism, in which a third party, typically governmental, acts retrospectively to “insulate the decision maker from the consequences of [a] thoughtless choice.”³⁵⁵ Here, again, we might think of a court stepping in to relieve an individual from the consequences of an emotionally-biased decision as such *ex post* or judicial paternalism.³⁵⁶

353. Though they may in fact, due to expertise in a particular area. *E.g.*, Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017 (2006).

354. Another common objection to the use of such “experts,” legislative or agency, is the possibility that the decisionmakers will be subject to “capture.” Though I fully recognize the objection, it warrants more extensive treatment than is available here. And, while fully recognizing the argument’s influence, I would also note comments bringing it into question. *E.g.*, Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29 (2003) (providing data showing that impact of interest groups and other elites on policy is less than is traditionally assumed); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2144 (2004) (noting theoretical and practical arguments against agencies’ “policy drift” in general and capture in particular). Thus, the objection is relevant but I will bracket it for now.

355. Klick & Mitchell, *supra* note 9, at 1636.

356. One commentator has suggested that because the individual initiates the court action, any judicial relief could not be paternalistic, as it would be consistent with the individual’s preferences. Seana Valentine Shffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFAIRS 205, 210 (2000) (“How then could rescission be paternalist since that is what the putatively protected party wills?”). As described above, however, see *supra* notes 19-24 and accompanying text, there is a tension between an expressed preference at one time that (a) is different from that expressed at another time and, more important, (b) does not reflect what the decisionmaker’s true preferences would be at the time of the expressed preference. Because the later preference is inconsis-

Such judicial paternalism might manifest in at least three ways, two retrospective in the sense just defined, and one—more narrow—prospective. First, as outlined in some of the examples presented earlier, a court might not choose to, or be able to, explicitly reverse a decision that was made due to emotional bias. Instead, the court might impose liability on the party that prompted the affective influence on the decision. Traditional principles could be broadened in order to determine such liability. In Professor Huang's application, for instance, securities fraud doctrine would be expanded to include the influence of affective factors on investor decisionmaking. Professor Marrow advocates expanding unconscionability doctrine and developing a new unconscionability tort. Professors Hanson and Kysar provide new justification for applying enterprise liability in the context of deliberate manipulation by industry and/or advertisers. And, though not advocating *per se* liability, I have suggested broadening the analysis under *Casey* of whether state-mandated "informed consent" information might constitute an "undue burden" in a woman's decisionmaking about abortion by inappropriately creating an emotional state that increases her susceptibility to persuasion.³⁵⁷

Second, courts might void a contract because of emotional influence. This could, of course, take place under a showing of traditional emotional duress. But more broadly, it also might stem from a showing that something induced a biasing emotional state, either conduct by one party (as in manipulation), or language in a contract (analogous to the securities litigation example). It may also arise from a broader reading of traditional contract doctrine, in two possible ways (both developed in the surrogate mother context). On one account, recognizing that emotions might be mispredicted, and thus change, may justify such a change as the sort of "changed circumstances" that should void a contract. On another account, such failure to fully predict or understand one's future emotions vitiates the fully informed consent necessary to the formation of a valid contract.³⁵⁸

Third, more speculatively, a court might prospectively strike down conduct by a defendant that will probably lead to emotional manipulation. This possibility may be most relevant in the abortion decisionmaking context sketched above: if a state mandates particular information in an "informed consent" provision, and if it can be shown that such information is likely to influence a large proportion

tent with the biased previous one and, by assumption, is more consistent with what the individual's unbiased preferences would be, intervention can be considered paternalistic. *But see* Shapiro, *supra* note 16, at 549 (noting suggestion that person at Time₁ is sufficiently different from person at Time₂ that Time₂ intervention need not even be considered paternalistic).

357. See Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22.

358. See Blumenthal, *Affective Forecasting*, *supra* note 4, at 210.

of the women in question, then there may be an argument under *Casey* for striking down the provision as unconstitutional.³⁵⁹ Again, I treat this discussion at more length elsewhere,³⁶⁰ but it is a useful instance of a court intervening prospectively to protect an individual from emotionally-biased decisionmaking.

In many of these contexts, the biases result from another party's manipulation. For all, however, the important judicial analysis will be ascertaining causality, both in the link between the defendant's conduct and the experience of the particular biasing emotion or mood, and between the emotion or mood and the decision—for the latter, perhaps some sort of “but for” causation.

At least two objections to judicial paternalism arise: institutional objections and a “slippery slope” argument. Professor Shapiro has suggested that legislatures are in a better institutional position than courts to act paternalistically.³⁶¹ Professors Kaplow and Shavell make a similar suggestion, based on their skepticism that courts can know litigants sufficiently well to ascertain their true preferences correctly.³⁶² I am not wholly persuaded by either point. First, Professor Shapiro in part suggests that courts should be restrained given our society's commitment “to the value of self-determination.”³⁶³ Of course, this objection—addressed in the section above discussing justifications for paternalism—might apply equally well, or equally poorly, to legislative paternalistic action. Shapiro also points to institutional constraints on courts, such as their reactive rather than proactive nature, the binding nature of precedent, and courts' inability relative to legislatures to undertake information gathering, investigation, and experimentation and monitoring of experiment outcomes.³⁶⁴ Accurate as these comments might be as descriptions of the courts' role, none shows dispositively that a court is an inappropriate vehicle for administering relief to an individual whose decision, by hypothesis, does not reflect his true preferences. Indeed, courts are routinely faced with individual litigants, a need to gather information concerning those litigants, and decisionmaking based heavily on those facts and information. This fact also goes to the second part of the institutional objection—that courts are insufficiently familiar with the subjects of the paternalistic action, and therefore are less able than the party or a legislature to ascertain that party's true

359. Cf. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992) (“The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”).

360. See Blumenthal, *Abortion, Persuasion, and Emotion*, *supra* note 22.

361. See Shapiro, *supra* note 16.

362. KAPLOW & SHAVELL, *supra* note 340, at 413 n.32.

363. Shapiro, *supra* note 16, at 521.

364. *Id.* at 551-55.

preferences. Robin West has suggested that judges faced with such individual litigants are in fact in a better position than legislators to make such determinations;³⁶⁵ Kaplow and Shavell are “skeptical,” particularly for appellate courts that “may never even meet the parties.”³⁶⁶ But the point here is that the plaintiff has asked the court to overturn an *earlier* decision as inconsistent with her true preferences. Accordingly, the judicial analysis, again, is focused less on ascertaining those preferences—though proving them may still be a hurdle—and more on traditional questions such as causation. The institutional objection, therefore, is not fatal to this approach.

Second, the slippery slope objection might argue that simply as a quantitative matter, litigation designed to rescind contracts or excuse a party from a decision or from obligations will increase. A facile response is that that possibility is an empirical matter: we will have to simply wait and see. Another response, however, is that by hypothesis, we do have a plaintiff experiencing an injury—in the form of nonoptimal consequences that *the individual erroneously chose*—from which he should be protected. And “[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a ‘flood of litigation.’”³⁶⁷ Finally, and perhaps ironically, it might be that drawing attention to the possibility of emotional bias by establishing a judicial remedy might alleviate the mistakes in the first place. That is, awareness of the remedy might heighten focus on emotional influences when an individual engages in decisionmaking, thereby reducing the likelihood that that emotion will influence that decisionmaking and avoiding the possibilities of moral hazard. If so, establishing such a regime might in fact decrease the likelihood of such mistakes and of the litigation that might ensue.

One might also object as a qualitative matter: because the plaintiff enters the litigation with the bare assertion that her preferences have changed, such litigation could have an inappropriately increased chance of success. Again, however, the plaintiff has the burden of proof: not only for causation—showing that defendant’s conduct induced a particular emotional state—but also for what her true preferences might have been. Concomitantly, she must demonstrate that absent the emotional manipulation she would more likely have made the alternative decision.³⁶⁸ Professor Marrow’s requirement

365. Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659 (1990).

366. KAPLOW & SHAVELL, *supra* note 340, at 413 n.32.

367. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 56 (5th ed. 1984).

368. In the abortion context, the fact that she sought an abortion might be one step toward showing this, though hardly dispositive. See also John Kindley, Comment, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595, 1640

that plaintiff show “damages directly and exclusively attributable to [defendant’s] act or actions” in part illustrates this burden.³⁶⁹ Of course, plaintiff would also have to show some injury that resulted from the biased decision.

V. SUMMARY AND CONCLUSION

There is little question that individuals do not conform well to the rational decisionmaker model posited by traditional law and economics. Our reasoning and decisionmaking about what is good for us is often flawed, our ability and motivation to seek full and unbiased information is often low, our susceptibility to manipulation by others is often high. These cognitive failings often serve us poorly, and legal and policy commentary has begun to turn toward consideration of what such failings imply about the propriety of third-party intervention to protect us from ourselves.

Less consideration has been given, however, to the implications of judgmental errors stemming from *emotional* factors. In this Article I highlighted differences between cognitive and emotional sources of such errors, reviewing a number of affective biases that had not been raised previously in the legal literature, and discussed “emotional paternalism”—that is, what implications such affective biases might have for paternalistic policy. More important, I discussed in more detail than previous work has the effectiveness with which some of these affective errors might be corrected. Commentators have recently decided that “paternalism is here to stay,”³⁷⁰ and that as a result, we must balance the costs and benefits of developing such intervention in determining whether it is appropriate. The discussion in Part IV of broad paternalistic interventions to debias individuals in their decisionmaking contributes to the discussion of such balancing. I showed that many such interventions are less likely to succeed than may have been assumed, especially in the context of emotional biases. I suggested that because of such difficulties, substituting the judgment of experts from the legislative or judicial context may in certain circumstances be appropriate.

In particular, legislatures might develop cooling-off periods for judgments or decisions that are likely to be biased by immediate or incidental emotions, especially ones involving self-relevant health and welfare risks.³⁷¹ Expert judgment in place of individuals’ might

(“Although . . . the plaintiff’s testimony about what she would have decided is not determinative, it is still relevant.”).

369. See Marrow, *supra* note 43, at 38 (identifying the tort of Consequential Procedural Unconscionability and defining its elements).

370. Glaeser, *supra* note 9, at 156.

371. Cf. *id.* (advocating the restriction of “paternalistic activities to areas where there is strong evidence of self-harm, like particularly dangerous drugs or suicide”).

be appropriate for judgments about or involving emotionally-laden events, such as disease, terrorism, and other high-risk but low-probability events. Judicial intervention may be appropriate when an individual should be relieved of the burdens of having made an emotionally-biased, harmful decision, especially one that can be shown to have been manipulated by another. Examples were fear- or anxiety-influenced abortion decisions, deliberate manipulation by advertisers or contractual parties, or certain investment decisions. Thus, procedural and even substantive paternalism is likely appropriate in many cases involving emotional biases, because the potential welfare benefits are high and the implementation costs, at least in terms of likelihood of success, are relatively low.

But as my debiasing review suggests, there are a number of instances in which implementation costs are high, because the effectiveness of debiasing or corrective measures is relatively low. In emotional paternalism instances in which implementation costs are elevated because intervention is not especially likely to succeed—my examples were various sorts of informational and educational intervention—interference in decisionmaking may be unwarranted, not because the decisions or consequences are unimportant and the benefits not high, but because the costs are, at least apparently, equally high. If intervention is likely to be unsuccessful, perhaps the “plausible *prima facie* reason to be cautious about paternalism”—the autonomy argument—can shoulder its persuasive burden.³⁷²

Moreover, there are many instances in which affective biases impinge on judgment and decisionmaking, but the implications of the individual judgment may not rise to the level of, say, judgments about terrorist attack, nuclear meltdown, disposition of frozen embryos, or surrogate motherhood. Here, there are costs other than implementation costs to consider: various derivative costs of paternalistic activity. Professor Glaeser has suggested some such costs, such as stigmatization of those who engage in particular conduct.³⁷³ But it is also the case that “social forces strongly influence the personal choices that affect . . . the beliefs, values and preferences—of individuals, care providers and policy makers—that determine when, and what kinds of, public interventions will be successful, or even acceptable.”³⁷⁴ One such social force is the passionate adherence to the importance of autonomy, especially in domains most likely to be in-

372. Blumenthal, *Affective Forecasting*, *supra* note 4, at 237.

373. Glaeser, *supra* note 9, at 150 (discussing emotional or psychic tax that results from soft paternalism, such as stigmatization of regulated behavior).

374. Shireen J. Jejeebhoy, *The Importance of Social Science Research in Protecting Adolescents' Sexual and Reproductive Choice*, 18 MED. & L. 255 (1999).

volved in emotional paternalism.³⁷⁵ Simply referring to “paternalism” can itself generate negative emotional responses, leading, as noted above, to a visceral unwillingness to accept the proposed intervention “as a matter of principle.”³⁷⁶ Certainly, the psychic cost of public reluctance to comply with a policy perceived as imposing on autonomy is one to be carefully incorporated into the cost-benefit analysis.³⁷⁷ That is, one factor in that analysis is the public’s potentially different perceptions of interventions dealing with emotion and ones dealing with thoughts or cognitions; the public may be even more unwilling to accept intervention dealing with emotional issues. Such psychic costs are clearly relevant in developing policy for protecting individuals in their decisions in relatively less important domains. The calculus should be considered too, though, even in more important domains.³⁷⁸

As such, paternalism is often appropriate and sometimes warranted, but should be applied only after careful cost-benefit analysis, including the costs of implementing the particular policy in question. In this I agree with recent commentators.³⁷⁹ Absent from their discussion, however, has been consideration of emotional biases in judgment, of what empirical research suggests about remedying such biases, and of the implications of such research for assessing such “implementation costs.” By highlighting “emotional paternalism,” my goal has been to help fill these gaps and further extend this important discussion.

375. *E.g.*, Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 332 (2005) (noting “the great emotional weight attached to the idea of free, autonomous individuals in Western liberal thought”).

376. Shapiro, *supra* note 16, at 530 (noting negative public reaction in Massachusetts to mandatory seat belt laws, due to perceived paternalistic nature of the law).

377. *Cf.* Sunstein, *supra* note 49, at 1173 (“[T]he risks created by rejecting private preferences are formidable, as the framers were well aware. Such a system raises the spectre of tyranny, as government attempts to change preferences in response to a perception that the current structure is not autonomous.”).

378. Glaeser, *supra* note 9, at 150 (even “perfectly” chosen paternalistic policies involve “deadweight” losses).

379. *See supra* notes 76-81.